PUBLIC VERSION

110-2020-305/C

COPY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina,	)	
Complainant,	)	**Proceeding No.: 20-293**
v.	)	**Bureau ID No.: EB-20-MD-004**
DUKE ENERGY PROGRESS, LLC,	)	
Defendant.	)	

DUKE ENERGY PROGRESS, LLC'S ANSWER AND AFFIRMATIVE DEFENSES TO AT&T'S POLE ATTACHMENT COMPLAINT

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I. EXECUTIVE SUMMARY

- The overarching flaw in AT&T's complaint is the baseless allegation that AT&T occupies the same one foot of pole space on DEP's poles as DEP's CATV and CLEC licensees. This assertion isn't merely incorrect; it is spectacularly wrong. The previous joint use agreement between the parties allocated [redacted] feet of space to AT&T's "exclusive use," and the current agreement allows AT&T to occupy as much space as it wants without additional payment. AT&T, for all it appears, is taking full advantage of this liberty. **AT&T occupies, on average, [redacted] feet of space on DEP's poles**—before even considering the proper allocation of the communication worker safety zone (a/k/the safety space).

- In addition to this [redacted] feet of space that AT&T physically occupies through its facilities, AT&T is also the cost-causer of an additional 3.33 feet of safety space on jointly used poles owned by DEP. **DEP does not need a communication worker safety zone on its own poles**. Unless the cost of this space is either shared, as is the case under the existing joint use agreement, or allocated to AT&T, it will result in DEP's electric ratepayers bearing the cost of pole space that has absolutely nothing to do with the provision of electric service.

- If AT&T was paying for [redacted] feet of space (well under the 7.9 it is actually occupying; [redacted] + 3.33 = [redacted]) in the same way that a CATV or CLEC licensee would pay for [redacted] feet of space on DEP's poles, AT&T would be paying an annual rate of approximately $[redacted] per pole—in other words, an amount far in excess of the rate AT&T actually pays under the existing joint use agreement.

- Moreover, unlike DEP's CATV and CLEC licensees, AT&T for the most part did not pay make-ready for access to DEP's poles. **DEP built (and maintains) a network of poles that is taller and stronger than necessary to provide electric service specifically to accommodate AT&T**. This not only saved AT&T more than $[redacted] dollars in make-ready costs, permitting fees and inspection costs, but it also indefinitely burdened DEP with the carrying cost of a network of poles that is taller, stronger and more expensive than necessary for its own service requirements. This $[redacted] in avoided make-ready, permitting and inspection costs, even after netting out the corresponding benefit to DEP, amounts to more than $[redacted] per pole on an annualized basis—an amount that exceeds AT&T's annual rate by nearly [redacted]%.

- AT&T's complaint also alleges that it enjoys no net advantages under the joint use agreement as compared to DEP's CATV and CLEC licensees. AT&T makes no effort to quantify the net advantages. Instead, AT&T relies upon the false premise that, because the benefits of the joint use agreement are reciprocal, they cancel each other out. Even assuming this was conceptually true, it ignores a huge mathematic fact: **AT&T reaps the benefit of being the licensee on 148,000 jointly used poles; DEP only reaps the benefit of being the licensee on 31,000 joint use poles**. In other words, AT&T enjoys a 117,000-pole advantage over DEP when it comes to the "reciprocal" benefits of being the licensee under the joint use agreement.

- Though the joint use agreement provides numerous benefits to AT&T, perhaps none is greater than the contractual right to remain attached to DEP's poles even in the event of termination. **AT&T, in essence, has a unilateral option on a perpetual license to remain attached to 148,000 DEP poles**. Under the joint use agreement, DEP cannot evict AT&T. AT&T, on the other hand, can choose at any time to remove its facilities from DEP's poles. AT&T has a choice. DEP does not. This unilateral option on a perpetual license eliminates the need (or even the contingency) of constructing a new network of 148,000 poles in the event of a termination. As set forth in the testimony of Mr. Kenneth Metcalfe, CPA, CVA, this unilateral option on a perpetual license provides a net benefit to AT&T of $[redacted] ($[redacted] per pole) on an annualized basis—an amount that far exceeds AT&T's actual joint use rental rate.

- AT&T's complaint also recycles the contrived argument that the infrastructure cost-sharing arrangement set forth in the joint use agreement is somehow the product of unfair bargaining leverage. AT&T makes this claim (1) without a shred of evidence, (2) notwithstanding the fact that the rate has remain unchanged since year 2000 (it is merely adjusted each year according to the Handy Whitman Index), and (3) despite the fact that **the cost-sharing in the joint use agreement falls squarely within what AT&T's own internal documents described as the "most equitable" means of cost allocation**. In any event, there is not opportunity for either party to exercise bargaining leverage over the other because, under the agreement, (1) neither party can unilaterally alter the rate, and (2) neither party can kick the other off its poles.

- AT&T first gave notice of this dispute on May 22, 2019. In all years prior to 2019, AT&T also reviewed the updated rates (adjusted according to the Handy Whitman Index) and, of its own accord, sent its "Form 6407" certifying the correctness of the rates. Nonetheless, AT&T seeks refunds for alleged overpayments going back to 2017. Despite the obvious factual problems with AT&T's refund claim, it also suffers from severe legal problems for either of two reasons. First, the applicable statute of limitations (if a claim for refund has any merit at all) is the two-year statute of limitations under 47 USC § 415. If a state law statute of limitations has any relevance to this proceeding, it is North Carolina's 3-year limitations period applicable to actions to rescind a contract: a 3-year period that began to run no later than July 12, 2011.

- For all of the reasons set forth above, and for all of the reasons set forth herein, the Commission should deny AT&T's complaint.

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II. PARTIES AND JURISDICTION

1. DEP admits that AT&T is an ILEC within some parts of North Carolina and South Carolina, including parts of DEP's service territory. DEP further admits that AT&T provides telecommunications services, and that it has used its power of incumbency (including but not limited to its benefits under the joint use agreement with DEP) throughout North Carolina and South Carolina to offer numerous other services and compete in additional markets. On information and belief, DEP admits that AT&T is a Georgia limited liability company with its principal place of business at the address stated in the second sentence of paragraph 1. DEP denies any remaining allegations in paragraph 1.

2. DEP admits the allegations in paragraph 2. DEP is an electric utility that serves approximately 1.5 million electric customers in a service area covering approximately 32,000 square miles in eastern North Carolina and northern South Carolina.[1] In North Carolina, DEP's service area includes the densely populated areas around Asheville, Raleigh and Wilmington. In South Carolina, DEP's service area includes the densely populated areas around Florence and Myrtle Beach.[2]

3. DEP admits that AT&T and DEP are parties to a joint use agreement dated October 20, 2000. DEP further admits that there are annual updates to Exhibits B, C and D to the joint use agreement to address changes in tabulated costs (which benefit AT&T through predictable and **drastically** lower-than-actual-cost pricing for modifications).[3] DEP denies the allegation that the joint use agreement "renewed after the March 11, 2019 effective date of the Third Report and

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[1] *See* Ex. A at DEP000246 (Declaration of Gilbert Scott Freeburn, Nov. 13, 2020 ("Freeburn Declaration") ¶ 4).

[2] *See id.*

[3] *See id.* at DEP000255-57, DEP000258-59 (Freeburn Declaration ¶¶ 23-25, 30-31).

Order." The notion of a "renewal" presupposes that the parties have a right to terminate the agreement. No such right exists with respect to existing attachments under the particular agreement at issue in this case. The agreement only allows for termination with respect to **future** attachments.[4] For this reason, there is no such thing as a "renewal" with respect to existing attachments, because neither party has a corresponding right of termination with respect to existing attachments.[5] DEP further admits that the parties share approximately 179,000 jointly used poles, with DEP owning approximately 148,000 and AT&T owning approximately 31,000. DEP denies any remaining allegations in paragraph 3.

4. DEP admits that, under the current state of the law (and without waiving its rights to later seek a change in the law), the Commission has jurisdiction over at least some of the issues raised in AT&T's complaint. For reasons set forth more fully at paragraphs 10 and 35 *infra*, the Commission should forbear from exercising its jurisdiction if the Commission believes that the existing state of the law would prohibit it from upholding the rates, terms and conditions in the joint use agreement between DEP and AT&T.

5. DEP admits that the states of North Carolina and South Carolina have not reverse preempted the Commission's jurisdiction over the rates, terms and conditions for pole attachments, but denies that the absence of reverse preemption means that either state lacks jurisdiction over this particular dispute. The admission set forth above is made without prejudice towards DEP's right to seek the intervention of the North Carolina Utilities Commission and/or the Public Service

[4] *See* Ex. 1 at DEP000130 (Joint Use Agreement, Article XVII.B.) ("Either party may terminate, upon one (1) year's notice in writing to the other party, the right to make additional Attachments. **Any such termination of the right to make additional Attachments shall not, however, abrogate or terminate the right of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement.**").

[5] This issue is addressed more fully in paragraph 11 *infra*.

Commission of South Carolina, if necessary, to avoid a massive shift of the cost of the jointly used network to DEP's electric customers and/or to avoid being "assigned" the cost of any space on its own poles that has no relevance to the provision of electric service. The dispute between the parties involves at least four "buckets" of substantive issues: (1) the rates AT&T pays for access to DEP's poles; (2) the rates DEP pays for access to AT&T's poles; (3) AT&T's access rights to DEP's poles; and (4) DEP's access rights to AT&T's poles. The Commission's jurisdiction extends only to the first of these four "buckets" of issues. DEP denies any remaining allegations in paragraph 5.

6. DEP admits that AT&T has also filed a nearly identical pole attachment complaint against DEP's affiliate, Duke Energy Florida, LLC, but denies that the complaint against Duke Energy Florida involves the "same set of facts." In the case between AT&T and Duke Energy Florida, there is a different joint use agreement at issue which predates, by several decades, the time at which DEP and Duke Energy Florida became affiliates. DEP further admits that there is no other action between the parties currently pending with the Commission or any court or other government agency based on the same set of facts at issue here. DEP denies that AT&T's complaint does not overlap with any issue in a notice-and-comment rulemaking proceeding that is currently before the Commission. The Commission is currently considering a petition for reconsideration which raises, among other issues, the viability of the very rule upon which a portion of AT&T's complaint is based.[6] The comment cycle in the above-referenced proceeding closed on November 19, 2018, and the Commission has not yet reached a decision.

[6] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Petition for Reconsideration of the Coalition of Concerned Utilities at 4-7 (Oct. 15, 2018).

7. DEP denies the allegations in the first sentence of paragraph 7. As noted in the Enforcement Bureau's September 4, 2020 Letter Ruling, the letter upon which AT&T relies to support the allegation that it "notified Duke Energy Progress in writing of the allegations that form the basis of this Complaint and invited a response within a reasonable period of time" was insufficient to meet the requirements of Rule 1.722(g).[7] With respect to the allegations in the second sentence of paragraph 7, DEP admits that the parties met in-person on two separate occasions but lacks knowledge or information sufficient to form a belief as to whether AT&T's participation was in good faith. Even after the first meeting between the parties, at which numerous issues were discussed and after which various pieces of data were exchanged between the parties (including, but not limited to, data regarding the actual amount of space occupied by AT&T), AT&T still insisted that it was entitled to the one-foot new telecom rate.[8] From DEP's perspective, at least, AT&T's position would have been akin to DEP refusing to consider a deviation from the cost-sharing provision in the parties' current joint use agreement. DEP, for its part, voiced its willingness to consider alternative cost-sharing structures.

III. THE JOINT USE AGREEMENT PROVIDES NET VAULE TO AT&T THAT FAR EXCEEDS AT&T'S NET PAYMENTS UNDER THE AGREEMENT.

8. DEP denies that AT&T "attaches to Duke Energy Progress's poles on terms and conditions that are materially comparable to those of a telecommunications carrier or a cable operator." AT&T attached in the first instance, and remains attached, to DEP's poles on terms and conditions that materially advantage AT&T over DEP's CATV and CLEC licensees. Specifically, the joint use agreement provides AT&T with at least five significant material advantages:

- DEP has built and maintained, and continues to build and maintain, a network

[7] Enforcement Bureau Letter Order at 2 (Sep. 4, 2020) (citing 47 C.F.R. § 1.722(g)).

[8] *See, e.g.*, Ex. 3 at DEP000169 (Letter from Dianne Miller, AT&T, to Scott Freeburn, DEP (Sep. 5, 2019)).

of poles of sufficient height and strength to accommodate AT&T with *de minimis* make-ready cost to AT&T.

- DEP has contractually agreed that, even in the event of a termination of the joint use agreement, AT&T can remain attached to DEP's poles.

- AT&T occupies space on DEP poles in a much different way than DEP's CATV and CLEC licensees. For example, AT&T does not occupy one foot of space like CATV and CLEC licensees. Instead, in the joint use agreement that governed the relationship between the parties immediately prior to the current joint use agreement, AT&T was allocated the "exclusive use of [redacted] feet of space."[9] More importantly, as set forth *infra*, AT&T is actually occupying significantly more space than it was allocated under the previous joint use agreement.[10]

- Under the joint use agreement, AT&T is not required to go through DEP's permitting process—a process with which DEP's CATV and CLEC licensees must fully comply.[11]

- With respect to make-ready, AT&T pays "tabulated costs" under the joint use agreement that are significantly lower than the actual cost of make-ready work that CATV and CLEC licensees are required to pay.[12]

DEP also denies that it "has continued to unlawfully charge AT&T pole attachment rates significantly higher than the [new telecom] rates charged to similarly situated telecommunications attachers." Even if the new telecom rate applied here (which it does not given the circumstances), it would need to be applied on a per foot basis to avoid discriminatory effect on CATV licensees occupying a similar amount of space.[13] **If the new telecom rate is applied on a per foot basis,**

[9] Ex. 2 at DEP000140 (1977 Joint Use Agreement, Article I.A.2).

[10] Under both the previous and the current joint use agreements, both parties are allowed to utilize as much space as needed "so long as such use does not unreasonably interfere with the use being made by the other party." *See* Ex. 1 at DEP000121 (Joint Use Agreement, Article III.A.); Ex. 2 at DEP000143 (1977 Joint Use Agreement, Article III.A.).

[11] Ex. A at DEP000254-55 (Freeburn Declaration ¶¶ 20-21).

[12] *See* Ex. 5 at DEP000178 (Exhibit B Cost Schedule, Table I); Ex. A at DEP000255-57, DEP000258-59 (Freeburn Declaration ¶¶ 23-25, 30-31).

[13] *See infra* ¶ 12; *see also* Ex. E at DEP000340-41 (Declaration of Kenneth P. Metcalfe, CPA, CVA, Nov. 12, 2020 ("Metcalfe Declaration") ¶¶ 35-36).

the result would be that AT&T pays a significantly higher per pole rate than required by the joint use agreement.[14] Further, prior to May 22, 2019 (when AT&T first gave notice that it wanted to discuss a revised cost sharing methodology), AT&T never requested a revision to the "pricing methodology" set forth in Article XIII.C. of the joint use agreement (or otherwise contended that the pricing methodology was unfair, unreasonable, unlawful or unjust). And this is despite an express provision in the joint use agreement providing a process for requesting such a revision: "Either party may make a request for review of the pricing methodology and the costs set forth in the Exhibits to this Agreement no sooner than at five (5) year intervals."[15]

9. DEP admits that the Commission revised its ILEC complaint rule in 2018 to create two rebuttable presumptions applicable to "pole attachment contracts entered into or renewed after [March 11, 2019]": (1) that an ILEC is similarly situated to a CATV and non-ILEC telecom carrier; and (2) that an ILEC may be charged a rate no higher than a rate determined in accordance with the Commission's telecom rate formula.[16] DEP denies that its joint use agreement with AT&T is either a "pole attachment contract" or that it was "entered into or renewed after [March 11, 2019]." The current joint use agreement has an effective date of January 1, 2001 (although the agreement also states that it is "applicable to the payment of rentals for the year 1997 and thereafter").[17] The agreement states that it "shall continue in full force until terminated by either party as set forth below [in Article XVII.B.], or as otherwise provided herein."[18] Article XVII.B. of the joint use agreement provides:

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[14] *See* chart *infra* ¶ 12.

[15] Ex. 1 at DEP000128-29 (Joint Use Agreement, Article XIII.D.).

[16] 47 C.F.R. § 1.1413(b).

[17] Ex. 1 at DEP000116 (Joint Use Agreement, Cover Page).

[18] *Id.* at DEP000130 (Joint Use Agreement, Article XVII.A.).

> Either party may terminate, upon one (1) year's notice in writing to the other party, the right to make additional Attachments. Any such termination of the right to make additional Attachments shall not, however, abrogate or terminate the right of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement.[19]

Neither party has terminated the agreement. DEP denies any remaining allegations in the first sentence of paragraph 9.

With respect to the second sentence in paragraph 9, DEP denies that it "offered no valid basis to rebut that presumption, only positing a handful of possible and undocumented competitive advantages that do not in fact exist." In two separate face-to-face meetings between representatives of the parties, DEP offered numerous valid reasons to retain the existing cost-sharing relationship, including but not limited to, the five specific reasons set forth in paragraph 8 *supra*.[20] These are not "possible" competitive advantages—they are actual, quantifiable competitive advantages. Though DEP had not, at the time of those face-to-face meetings, endeavored to perform any kind of precise economic quantification of the various competitive advantages, it made clear to AT&T that it would do so if the parties were unable to reach an amicable resolution.[21]

AT&T appears to be creating a construct that would justify its refusal to negotiate unless and until DEP presents its entire "case in chief" before a complaint is even filed. Good faith negotiation demands more. Good faith negotiation demands a level of vision and intellectual honesty that allows both parties an opportunity to achieve an efficient resolution to a dispute.

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[19] *Id.* at DEP000130 (Joint Use Agreement, Article XVII.B.).

[20] *See* Ex. B at DEP000286 (Declaration of David J. Hatcher, Nov. 13, 2020 ("Hatcher Declaration") ¶ 11).

[21] *See id.* at DEP000287 (Hatcher Declaration ¶ 13).

AT&T's "not until you show me" approach is neither intellectually honest nor efficient. AT&T is free to disagree with DEP's positions, but to suggest that DEP offered "no valid basis to rebut the presumption" isn't just wrong—it is dishonest. DEP denies any remaining allegations in paragraph 9.

A. AT&T Is Not Entitled to the New Telecom Rate Because It Is Not Similarly Situated to DEP's CATV and CLEC Licensees.

10. DEP admits that, under the Commission's rules, similarly situated attaching entities should pay similar pole attachment rates for comparable access, but DEP denies that AT&T is similarly situated to the attaching entities who pay the new telecom rate for attachments to DEP's poles. Among other things: (1) AT&T occupies far more space; (2) AT&T gained access through a built-to-suit network, rather than expensive make-ready; (3) AT&T enjoys an indefinite contractual right to remain attached to DEP's poles even in the event of a termination for convenience or default (in other words, AT&T does not bear any contractual risk of displacement—even in the event of default—unlike other attaching entities); (4) DEP pays vastly lower make-ready costs under the "tabulated cost" provisions of the joint use agreement, as compared to the actual costs for make-ready that DEP's CATV and CLEC licensees are required to pay; and (5) AT&T, unlike CATV and CLEC licensees, is not required to go through DEP's permitting process (and incur its attendant costs) prior to attaching to DEP's poles. DEP further denies that "AT&T is entitled to rate relief in this case." Under the "rate" methodology set forth in Article XIII.C. of the joint use agreement, if AT&T owned approximately [redacted]% of the jointly

used poles and DEP owned approximately [redacted]% of the jointly used poles, then neither party would make a net annual payment to the other.[22]

This arrangement is further evidenced by the fact that the preceding joint use agreement (executed in 1977) stated "it is mutually agreed that [redacted] percent of the annual cost of joint use poles should be borne by the Electric Company and [redacted] percent should be borne by the Telephone Company."[23] In fact, the preceding joint use agreement did not include any kind of "per pole" rate at all—it merely outlined the manner in which each party's share of the "annual cost of joint use poles" was to be calculated.[24] The current joint use agreement (executed in October 2000) brought simplicity to this concept and lowered AT&T's cost responsibility from [redacted]% to [redacted]% "because of changed conditions and experience gained."[25] This arrangement is economically no different than a provision that **requires** each of the parties to buy its way back into the targeted joint use pole ownership (to ensure each party is carrying its contractual share of the annual ownership costs of the joint use pole network). Under an agreement that required AT&T to own a specified share of the jointly used pole network, AT&T could not complain about the need for "rate relief" because its actual concern would be with the share of the joint use network it was contractually required to carry. The Commission should not engage in blue-penciling the joint use agreement here simply because AT&T enjoys the contractual benefit of **not** being required to maintain a particular level of pole ownership within the jointly used network. Under AT&T's twisted postulation of how the Commission's rules should work, this contractual **benefit** to AT&T (*i.e.*, not being required to buy

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[22] *See* Ex. 1 at DEP000128 (Joint Use Agreement, Article XIII.C.); *see also* DEP's Responses to AT&T's First Set of Interrogatories at p. 2 (explaining the cost allocation methodology under the joint use agreement).

[23] Ex. 2 at DEP000158 (1977 Joint Use Agreement, Article XII.B.).

[24] *Id.* at DEP000159 (1977 Joint Use Agreement, Article XII.D.).

[25] Ex. 1 at DEP000119 (Joint Use Agreement, Recitals at p. 1).

its way back into parity) would entitle AT&T to "rate relief" when the benefit should, instead, be a basis for upholding the bargain. If AT&T's postulation is correct, then the Commission should forbear from applying its rules in this situation in order to avoid a grossly inequitable result.[26]

1. The new telecom rate presumption does not apply, but even if it did, it would warrant a rate roughly equivalent to the current rate under the joint use agreement.

11. DEP denies that its joint use agreement with AT&T is a "newly-renewed" agreement as defined in the Third Report and Order. The joint use agreement is still within its initial (and only) term. More importantly, though, the joint use agreement makes clear that even a termination "shall not, however, abrogate or terminate the rights of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement."[27] In other words, **as it relates to existing attachments, the joint use agreement cannot be "renewed" because there is no corresponding right of termination**. A "renewal" requires some sort of voluntary action by the parties (even if it is merely acquiescence). In this situation, there is no such voluntary action. Neither party (as pole owner) can decline to renew the agreement with respect to existing

[26] See 47 U.S.C. § 160(a) (The Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."); *see also* 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[27] Ex. 1 at DEP000130 (Joint Use Agreement, Article XVII.B.).

attachments. Similarly, with respect to existing attachments, the joint use agreement cannot be in "evergreen" status because an "evergreen" contract is one that "does not renew, but continues until such time as one party takes affirmative action to terminate it."[28] Without the right of termination, a contract cannot be in "evergreen" status.

To put this in numerical terms, DEP is stuck with AT&T on roughly 148,000 poles unless and until AT&T decides that it wants to remove its facilities.[29] AT&T, on the other hand, can remove its facilities from any or all of those 148,000 poles whenever it chooses, and it will no

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[28] *Bentley Systems, Inc. et al. v. Intergraph Corp.*, 922 So. 2d 61, 75-76 (Ala. 2005); *see also Trustees of the B.A.C. Local 32 Ins. Fund v. Fantin Enters.*, 163 F.3d 965, 968-69 (6th Cir. 1998) (characterizing the following language as an evergreen clause: "It is agreed by both parties that this Agreement shall remain in full force and effect through May 27, 1992 and from year to year thereafter unless written notice of intent to terminate or modify the Agreement be submitted, at least sixty (60) days prior to the expiration date by either party to the other."); *Cibro Petroleum Products, Inc. v. Sohio Alaska Petroleum Co.*, 602 F. Supp. 1520, 1530 n.9 (N.D.N.Y 1985) ("[A]n 'evergreen contract' is the customary trade usage term in the petroleum industry for a contract which continues indefinitely until terminated by either party pursuant to a particular notice period specified in the contract."); *Cent. States v. Sara Lee Bakery Grp., Inc.*, 660 F. Supp. 2d 900, 917 (N.D. Ill. 2009) ("A contract containing an 'evergreen' clause binds an employer to subsequent [collective bargaining agreements] until the contract is properly terminated."); *N. New Eng. Carpenters Pension Plan & Tr. v. H.P. Cummings Constr. Co.*, No. 02-180-P-H, 2003 U.S. Dist. LEXIS 5923, at *4-5 (D. Me. Apr. 10, 2003) ("This agreement included an 'evergreen' clause, which provided that it would continue in effect from year to year after the stated expiration date unless and until notice of intent to terminate was given at least 60 days prior to an expiration date."); *Sherwin Alumina, L.P. v. Aluchem, Inc.*, Civil Action No. C-06-183, C-06-210, 2007 U.S. Dist. LEXIS 21237, at *3-4 (S.D. Tex. Mar. 23, 2007) ("The Supply Agreement is 'evergreen,' meaning that the Agreement continues in effect for subsequent two-year terms unless either party terminates the Agreement in writing twelve months prior to the end of the current contract term."); John C. Muhs, *Contract: Evergreen Clauses: Still a Useful Commercial Contracting Tool, but Not Without Pitfalls*, 97 MI Bar Jnl. 22, 23 (Sept. 2018) ("A typical evergreen clause generally provides that the term of an agreement will automatically renew for subsequent periods of the same length unless either party provides written notice of termination to the other party within some minimum period before the current term expires.").

[29] Even though this provision is reciprocal, it is one of the many provisions in the joint use agreement that disproportionately benefits the party owning less than its implied share of the joint use network. As discussed *supra*, AT&T owns only 31,000 of the jointly used poles, meaning AT&T is only "stuck" with DEP on 31,000 poles (versus the 148,000 poles on which DEP is "stuck" with AT&T).

longer be required to pay a "rate" with respect to such poles. Given this, and under the specific joint use agreement at issue here, the Commission's presumptions cannot, as a matter of law and logic, apply to attachments in existence as of the effective date of the new rule. Otherwise, this would be tantamount to forced access at regulated rates—a result that all parties and the Commission agree is inconsistent with the scope of the Pole Attachments Act.[30] As it relates to **new** attachments (a right terminable and thus "renewable" by both parties), DEP is willing to allow AT&T to gain access to such poles under rates, terms and conditions identical to DEP's CATV and CLEC attachers, a point which DEP made clear in the July 26, 2019 and October 24, 2019 meetings between the parties.[31] DEP denies any remaining allegations in paragraph 11.

12. DEP denies that AT&T is entitled to a "rate determined in accordance with Commission Rule 1.1406(d)(2)" under the law and facts of this case. With respect to the second sentence of paragraph 12, DEP denies that AT&T has properly calculated the one-foot rate applicable to CATV and CLEC licensees for years 2017-2019. With respect to the third sentence of paragraph 12, DEP admits that AT&T has correctly stated the contract rates applicable to AT&T's use of DEP's poles but denies the remaining allegations. DEP's one-foot CATV and

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[30] *See* 47 U.S.C. § 224(f)(1), (a)(5) (restricting mandatory access to "cable television system[s] or any telecommunications carrier" and expressly excluding ILECs from the definition of "telecommunication carrier" for purposes of section 224); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5327-28 at ¶ 202 (Apr. 7, 2011) ("*2011 Order*") (noting that "incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1)"); *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket 07-245, Reply Comments of AT&T, Inc. at 20 (Apr. 22, 2008) (noting that "the right of access to poles under section 224(f)" is something "which ILECs do not enjoy").

[31] *See* Ex. B at DEP000289, DEP000290-91 (Hatcher Declaration ¶¶ 17, 19). AT&T expressed no interest in this proposal. *See id.* at DEP000289 (Hatcher Declaration ¶ 17).

CLEC rates, based on a single attachment occupying one-foot of usable space for the 2017-2019 billing years, are as follows:[32]

	2017	2018	2019
CATV	$7.25	$6.83	$7.97
CLEC	$7.24	$6.81	$7.95

AT&T, though, occupies significantly more space on DEP's poles than the one foot occupied by CATV and CLEC licensees. Under the preceding joint use agreement, AT&T was allocated "the exclusive use of [redacted] feet of space,"[33] and field data indicates that AT&T **actually** currently occupies, on average, at least [redacted] feet of space on DEP's poles (excluding any portion of the communication worker safety zone).[34] On average, AT&T's highest attachment on DEP poles is at [redacted] feet (measured at the pole),[35] and the Commission presumes that the lowest point of attachment is at 18 feet.[36]

Moreover, on poles owned by DEP, AT&T is the cost causer of the communication worker safety zone[37] (a/k/a the safety space), which is typically 40 inches (3.33 feet).[38] Given this, AT&T

[32] *See* Ex. D at DEP000305 (Declaration of Dana M. Harrington, Nov. 12, 2020 ("Harrington Declaration") ¶ 10).

[33] Ex. 2 at DEP000140 (1977 Joint Use Agreement, Article I.A.2).

[34] *See* Ex. A at DEP000248 (Freeburn Declaration ¶ 9).

[35] *See id.*

[36] *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6465 at ¶ 16 (Apr. 3, 2000) ("In the *Third Order*, the Commission relied on *NESC* guidelines and data received in its rulemaking proceedings to affirm the presumption of an average 18 feet for minimum ground clearance...").

[37] *See* National Electrical Safety Code (NESC), IEEE Standards Association, Rule 238.E (2017).

[38] DEP does not need the communication workers safety zone without communications attachments on its poles. Given that AT&T was the "first comer" to DEP poles, and given that the Commission has already determined that CATV and CLEC attachers should not bear this cost, this cost must fall to AT&T—to put this cost on DEP's electric ratepayers would be requiring the electric ratepayers to pay for something that is not necessary (or even useful) in the provision of electric service. *See* Ex. A at DEP000252-53 (Freeburn Declaration ¶¶ 17-18); Ex. B at

is actually or constructively occupying approximately [redacted] feet of space on joint use poles owned by DEP ([redacted] + 3.33 = [redacted]). The one-foot CATV and CLEC rates, if they apply at all, should be applied on a per foot basis in the same manner as the CATV rate would be applied. Otherwise, the application of the new telecom rate would discriminate against CATVs because, under the cable rate formula, whether one inputs the number of feet of space occupied into the formula, or one multiplies the one-foot rate by the number of feet of space occupied, the mathematical result is the same.[39] Under this scenario, the "rates" actually paid by AT&T to DEP between 2017-2019 compare to the new telecom rate (multiplied by the conservatively expressed [redacted] feet of usable space occupied by AT&T) as follows:[40]

DEP000285, DEP000289-90 (Hatcher Declaration ¶¶ 9, 18); Ex. C at DEP000296-97 (Declaration of Steven D. Burlison, P.E., (Nov. 13, 2020) ("Burlison Declaration") ¶¶ 7-10); Ex. D at DEP000309 (Harrington Declaration ¶ 17); Ex. E at DEP000339-40, DEP000341 (Metcalfe Declaration ¶¶ 32-33, 37); *see also infra* ¶ 25.

[39] Of the approximately 480,481 non-ILEC attachments on DEP's poles, 338,973 of them (71%) are CATV attachments. *See* Ex. A at DEP000246 (Freeburn Declaration ¶ 4). In other words, it is the CATVs—not the CLECs—with whom AT&T is competing in DEP's service area. Further, the entire purpose of the Commission's 2011 and 2015 revisions to the telecom rate was to put non-ILEC telecom carriers on equal footing with CATVs. *See 2011 Order*, 26 FCC Rcd at 5305, ¶ 151 (noting that the new telecom rate formula "generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate" and further noting that "this approach will significantly reduce the marketplace distortions...that rose from disparate rates"); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 30 FCC Rcd 13731, 13738 at ¶ 16 (Nov. 24, 2015) ("[The Commission] take[s] this step...to bring cable and telecom rates for pole attachments into parity at the cable-rate level."). To apply the new telecom rate as proposed by AT&T not only would discriminate against CATVs but would also frustrate the Commission's entire purpose for revising the telecom rate. *See also* AT&T's Pole Attachment Complaint, Ex. E at ATT00053, ATT00057, ATT00061 (Affidavit of Christian M. Dippon, Ph. D., Aug. 31, 2020, ¶¶ 7, 7 n.2, 14, 21 n.36, 21) (noting that AT&T competes with CATVs in the markets covered by the joint use agreement at issue in this case).

[40] The CATV and CLEC rate calculations use the more conservative [redacted] feet of space, rather than the actual [redacted] feet of space.

	2017	2018	2019
CATV Rate	[redacted]	[redacted]	[redacted]
CLEC Rate			
Contract Rate paid by AT&T (per pole)			

Thus, the contract rate paid by AT&T is significantly **less** than what a CATV or CLEC would have paid for the same burden on the pole. For this reason, DEP denies that the contract rates are "excessively and unreasonably high." For all it appears, the contract rates may have been unreasonably **low**—and this is **before** even accounting for the massive net benefits AT&T enjoys under the joint use agreement.[41] DEP denies any remaining allegations in paragraph 12.

2. The joint use agreement provides AT&T significant material advantages over DEP's CATV and CLEC licensees.

13. DEP admits that the "new telecom rate presumption is rebuttable" but denies the allegation that DEP "cannot meet its burden here." The clear language of the joint use agreement itself rebuts the presumption. But in addition to the clear language of the joint use agreement, the actual data from the field, the testimony of DEP's witnesses, and the economic evaluation submitted by Mr. Kenneth P. Metcalfe, CPA, CVA rebut the presumption in this case. DEP further admits that, with respect to claims following the March 11, 2019 effective date of Rule 1.1413(b), the revised rule requires "clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems." The evidence submitted by DEP herewith satisfies this burden.[42] Moreover, since it

[41] Ex. E at DEP000359 (Metcalfe Declaration, Ex. E-1).

[42] AT&T's complaint glosses over the fact that the new presumptions and new burden of proof apply only with respect to AT&T's claim for post-March 11, 2019 relief. No such presumptions exist for the period prior to March 11, 2019, and the burden of proof for that period lies with AT&T. *See* discussion *infra* ¶ 21; *see also* 47 C.F.R. § 1.1424 (2011) ("In complaint

first asserted jurisdiction over the rates, terms and conditions for ILEC attachments on electric utility poles, the Commission has consistently found that the joint use agreement at issue provided net benefits to the ILEC complainant.[43]

14. DEP denies the allegations in the first sentence of paragraph 14. AT&T cites the 2011 Order for the proposition that "the electric utility must weigh and account for all of the different rights *and responsibilities* placed on the ILEC as compared to its competitors" (emphasis in original) and specifically quotes paragraph 216 n.654 of the 2011 Order as follows: "A failure to weigh, and account for, the different rights and responsibilities in joint use agreement[s] could lead to marketplace distortions." DEP completely agrees that "[a] failure to weigh, and account for, the different rights and responsibilities in joint use agreement[s] could lead to marketplace distortions." The Commission's point in this statement, which immediately followed a lengthy acknowledgement of the many benefits to ILECs under joint use agreements, was that simply giving ILECs the same one-foot rate paid by CATVs and CLECs would give ILECs an unfair advantage over their CATV and CLEC competitors.[44] For this reason, the Commission stated in

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proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, **the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated** by reference to any relevant evidence, including pole attachment agreements.") (emphasis added).

[43] *See, e.g., In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 19-187, 35 FCC Rcd 5321, 5328 at ¶ 14 (May 20, 2020) ("*AT&T v. FPL Decision*") (finding that ILEC "receives significant benefits under the [joint use agreement] not afforded competitive LECs and cable attachers"); *In the Matter of Verizon Florida, LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1150 at ¶ 26 (Feb. 11, 2015) (noting that ILEC "received benefits under the [joint use agreement] that were not available to other attachers").

[44] *See 2011 Order*, 26 FCC Rcd 5240, 5335 at ¶ 216 n.654.

the very next sentence following the sentence quoted by AT&T: "**We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators.**"[45]

DEP denies the allegation in the second sentence of paragraph 14 that "an ILEC that bears the cost to perform a service itself (*e.g.*, a pole inspection) is not advantaged relative to its competitor that pays the utility pole owner to perform the same service." This allegation is incorrect because it assumes that CATVs and CLECs are not incurring similar internal costs for things like pre-construction inspections, post-construction inspections and quality control. CATVs and CLECs **should** be performing these tasks on their own (1) before submitting permit applications to DEP and (2) after completion of construction. The inspections performed by DEP during the CATV and CLEC attachment process are *in addition to* the inspections performed by the CATVs and CLECs themselves and are performed because CATVs and CLECs are not afforded the same deference as ILECs (given their historical, but fading, position as joint custodians of shared infrastructure). But perhaps more to the point, AT&T is not required to pay DEP for inspections, whereas CATV and CLEC licensees **are** required to pay DEP for inspections.[46] And this is what should matter when comparing joint use agreements against pole license agreements. Otherwise, an ILEC could always contend (as AT&T is contending here) that its unquantified internal costs (whether measured in dollars or other resources) somehow offset its benefits under the joint use agreement as compared to CATV and CLEC license agreements.

With respect to the third and fourth sentences of paragraph 14, DEP admits that the joint use agreement affords AT&T certain benefits and imposes certain burdens that differ from those

[45] *Id.* (emphasis added).

[46] *See* Ex. A at DEP000254-55 (Freeburn Declaration ¶ 21).

in a CATV or CLEC license agreement. But the actual scope of those benefits and burdens is directly tied to pole ownership. As one party's pole ownership increases, the burdens on that party under the joint use agreement increase, and the benefits to that party under the joint use agreement decrease. Correspondingly, as a party's pole ownership decreases, the burdens on that party decrease, and the benefits to that party increase. Here, where AT&T enjoys those benefits on 148,000 poles and DEP enjoys them only on 31,000 poles, DEP is 117,000 poles "in the hole" on the reciprocal burdens and benefits. The reciprocal benefits—benefits that AT&T seems to acknowledge—disproportionately benefit AT&T given the parties' relative pole ownership. And this is where the cost sharing provisions of the joint use agreement step in to level the field. If the pole ownership burden were in equilibrium with the implied ownership target ([redacted]%/[redacted]%) set forth in the joint use agreement (see paragraph 10 *supra*), then the net annual rental payment by AT&T would be $0. DEP denies any remaining allegations in paragraph 14.

15. To the extent the first sentence of paragraph 15 alleges that DEP rejected the suggestion that AT&T should pay a rate identical to the one-foot rate paid by DEP's CATV and CLEC licensees, DEP admits the allegations. As set forth above, AT&T occupies significantly more space on DEP poles than DEP's CATV and CLEC licensees.[47] DEP denies the allegation in the first sentence that it merely "theorized" at the July 26, 2019 and October 24, 2019 meetings that AT&T enjoys significant net benefits under the joint use agreement. At these meetings, DEP specifically discussed at least five issues of consequence relating to the benefits AT&T enjoys under the joint use agreement as compared to CATV and CLEC licensees:

- AT&T's space occupancy ([redacted] feet), as compared to the one foot of space allocated to DEP's CATV and CLEC licensees;

[47] *See supra* ¶ 12.

- The make-ready costs AT&T avoided through DEP's construction of a built-to-suit network of poles with sufficient vertical and loading capacity to accommodate AT&T's attachments (both the current agreement and the preceding agreement define a "standard" poles as a 40 foot pole), as compared to DEP's CATV and CLEC licensees who take the pole as they find it;

- The "tabulated costs" that AT&T pays under the joint use agreement (Exhibit B) for make-ready, as compared to the actual work order costs that DEP's CATV and CLEC licensees are required to pay; and

- The perpetual license enjoyed by AT&T even in the event of a termination for convenience (per Article XVII.B.) or default (per Article XIV.A.), as compared to the removal-upon-termination provisions in CATV and CLEC license agreements.[48]

With respect to the second sentence of paragraph 15, DEP admits that it did not endeavor to specifically quantify the value of these significant benefits to AT&T during the discussions between the parties. As set forth in DEP's September 10, 2020 letter to AT&T:

> Though we never provided AT&T with any sort of precise quantification of those net benefits, we do not think such an undertaking is either necessary for intellectually honest settlement discussions or an efficient use of resources outside of a litigated dispute. If AT&T required, as a condition to settlement discussions, visibility into the complete financial valuation Duke Energy would intend to offer in a litigated dispute, then there was minimal hope for fruitful discussions.[49]

DEP specifically denies that it "never identified relevant language in the JUA or its operative license agreements" regarding the immense net benefits to AT&T under the joint use agreement. As set forth above, DEP specifically identified (by substance, if not by section) the relevant provisions of the joint use agreement and how similar subjects were addressed in DEP's CATV and CLEC license agreements.[50]

DEP denies the allegations in the third sentence of paragraph 15 that the benefits set forth above "are non-existent or not competitive benefits at all." DEP understands that this is AT&T's

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[48] *See* Ex. B at DEP000286, DEP000288-89 (Hatcher Declaration ¶¶ 11, 16).

[49] Ex. 4 at DEP000171-76 (Letter from Scott Freeburn to Dianne Miller (Sep. 10, 2020)).

[50] *See* Ex. B at DEP000286 (Hatcher Declaration ¶ 12).

position, but as set forth herein and as quantified literally by feet and dollars, AT&T is just plain wrong. DEP further denies that any of the net benefits discussed by the parties at the July 26, 2019 and October 24, 2019 meetings have been "previously rejected by the Commission." This allegation makes no sense for several reasons. First, existing Commission authority supports, rather than undermines, accounting for the space occupied by an attachment.[51] The space presumptions, after all, are presumptions—and rebuttable presumptions at that. Second, the Commission has not yet addressed how the avoided make-ready costs or perpetual license provisions in a joint use relationship impact the assessment of just and reasonable rates—nor could it categorically "reject" either given that these are actual, quantifiable benefits that are specific to a particular relationship. Here, the testimony of Mr. Kenneth P. Metcalfe, CPA, CVA demonstrates the following:[52]

- The annualized per pole net benefit to AT&T of avoided make-ready costs (not including the avoided permitting, engineering and inspection costs) is $[redacted].
- The annualized per pole net benefit to AT&T of the perpetual license (not including contingency costs) is $[redacted].

What AT&T really means in paragraph 15 (and as corroborated by the allegations in paragraphs 16-20) is that it was not willing to earnestly consider anything DEP said during the July 26 and October 24, 2019 meetings. This is the substantive and functional equivalent of DEP

[51] *See, e.g., In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6799 at ¶¶ 41-42 (Feb. 6, 1998) ("*1998 Report and Order*") (acknowledging the differences between wireline and wireless attachments and stating that "[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted"); *2011 Order*, 26 FCC Rcd at 5306, ¶ 153 (reaffirming that, for purposes of calculating annual rental, pole owners can rebut the one-foot presumption by demonstrating that a wireless attachment occupies more than one foot of space on a pole).

[52] *See* Ex. E at DEP000359, DEP000375 (Metcalfe Declaration, Ex. E-1, Ex. E-4.1).

simply rejecting AT&T's request to meet, which Rule 1.722(g) deems to be "an unreasonable practice under the Act."[53] DEP denies any remaining allegations in paragraph 15.

16. DEP admits the allegations in the first sentence of paragraph 16 with one important exception: DEP explained that it installed taller poles than necessary for electric service **specifically to accommodate AT&T**—not just "communications attachers" generally. **The reason DEP and its predecessors-in-name built a network of poles taller and stronger than necessary for the provision of electric service in its overlapping service area with AT&T was because of the joint use agreement**.[54] The current and preceding joint use agreements explicitly identified a 40-foot pole as the "standard joint use pole" in order to accommodate AT&T's attachments and the required communication worker safety zone.[55] DEP, in its overlapping service area with AT&T, has always installed poles taller and stronger than necessary to meet only DEP's service needs.[56] DEP would not have installed taller and stronger poles but for the joint use agreement (and its infrastructure cost sharing provisions), because DEP could not have justified the additional investment without the joint use agreement (and its infrastructure cost sharing

[53] 47 C.F.R. § 1.722(g).

[54] *See* Ex. C at DEP000298 (Burlison Declaration ¶ 12); *see also* Ex. 1 at DEP000120, DEP000122-26 (Joint Use Agreement, Articles I.K., VII); Ex. 2 at DEP000141, DEP000146-54 (1977 Joint Use Agreement, Articles I.B., VII). The fact that DEP built a network of poles that was taller and stronger than necessary, specifically for AT&T's benefit, is not credibly in dispute. AT&T offers no facts to the contrary and acknowledges that "in the early days of joint use [*i.e.*, when DEP's network was initially constructed]…AT&T was the only consistent communications attacher on utility poles at that time." AT&T's Pole Attachment Complaint, Ex. C at ATT00045 (Affidavit of Mark Peters, Aug. 31, 2020, ¶ 21).

[55] *See* Ex. 1 at DEP000120 (Joint Use Agreement, Articles I.K.); Ex. 2 at DEP000141 (1977 Joint Use Agreement, Articles I.B.).

[56] Ex. B at DEP000284-85 (Hatcher Declaration ¶ 8); Ex. C at DEP000295-96, DEP000297-98 (Burlison Declaration ¶¶ 5, 11-13).

provisions).[57] AT&T did not just happen upon a network of poles in DEP's territory that accommodated its service needs. DEP specifically constructed its network, and has continued to construct and maintain its network, in a way that accommodates AT&T's needs.[58]

DEP denies the allegations in the second and third sentences of paragraph 16 because DEP does not build capacity in its network for CATV and CLEC licensees. This built-to-suit privilege is uniquely enjoyed by AT&T in the parties' overlapping service areas. CATV and CLEC licensees take the pole as they find it. Thus, this is not, as AT&T alleges, a benefit that "extend[s] equally to AT&T's competitors attached to the same poles." It is not a benefit that extends to AT&T's competitors at all. At most, it is an occasional incidental benefit to CATVs and CLECs—certainly not the type of **contractual** benefit of relevance to a case like this. And, as NCTA's recent Petition for Declaratory Ruling suggests, CATVs and CLECs are often required to pay for pole replacements—even to accommodate an attachment that presumptively occupies only one foot.[59]

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[57] *See* Ex. B at DEP000284-85 (Hatcher Declaration ¶ 8).

[58] To this point, AT&T cites the *AT&T v. FPL Decision* for the proposition that "FPL did not build its poles just to accommodate AT&T." *AT&T v. FPL Decision*, 35 FCC Rcd at 5330, ¶ 15. Whether FPL built taller and stronger poles to accommodate AT&T is of no consequence to the outcome in this case where the evidence is undisputed that DEP built, and has continued to build and maintain, a taller and stronger network of poles than it would have built in the absence of the joint use agreement (148,000 of them). A case such as this requires the finder of fact to ascertain what the parties would have done in the absence of the joint use agreement. On this issue, DEP's testimony is unequivocal. *See* Ex. A at DEP000250 (Freeburn Declaration ¶ 12); Ex. B at DEP000284-85 (Hatcher Declaration ¶¶ 8-9); Ex. C at DEP000297-298 (Burlison Declaration ¶¶ 11-12). DEP expects that AT&T would concede that AT&T would not have built and maintained the taller/stronger poles occupied by DEP (approximately 31,000 of them) but for the joint use agreement. AT&T did not need 40-foot poles to provide its service, much as DEP did not need 40-foot poles (and currently does not need the space utilized by AT&T or the communication worker safety zone) in order to provide electric service. **This issue is not even close**.

[59] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84, NCTA's Petition for Expedited Declaratory Ruling at 9 (Jul. 16, 2020) (claiming that broadband deployment "frequently triggers the need for

17. DEP denies the allegations in the first and second sentences of paragraph 17. AT&T seems to admit that, unlike DEP's CATV and CLEC licensees, it is not required to submit permit applications before making attachments (what AT&T misleadingly refers to as "a different permitting arrangement"). But then AT&T asserts in conclusory fashion that its ability to make attachments without going through DEP's permitting process "does not benefit AT&T, is not a material difference, and, in any event, is reciprocal." Given the incredible amount of attention the Commission has devoted over the past decade to streamlining attachment and overlashing processes (not to mention the amount of effort attaching entities have put into advocating for these changes), it is unfathomable that AT&T would argue that their ability to avoid these processes altogether is immaterial. In fact, the Commission should take "judicial notice" of the fact that the contractual ability to avoid permitting and overlashing processes is a material benefit. AT&T hedges its argument by saying that this material benefit "in any event, is reciprocal." Of course, as set forth above, the offsetting effect of reciprocity is precisely inversely proportional to pole ownership. Here, AT&T benefits on 148,000 poles; DEP benefits on only 31,000 poles.

With respect to the third sentence of paragraph 17, DEP admits that, during the July 2019

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replacement poles" and that new attachers are generally required to bear the cost of pole replacements); *see also In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84, Initial Comments of Charter Communications, Inc. at 3 (Sep. 2, 2020) (stating that it is a "common utility practice" to require new attachers to bear the cost of make-ready pole replacements); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket 17-84, Initial Comments of Crown Castle Fiber LLC at 8 (Sep. 2, 2020) (claiming that "utilities routinely insist that a new attacher pay the full cost to replace an old pole") (internal quotation marks omitted). The position taken by NCTA (whose members attach to electric distribution poles via pole license agreements rather than joint use agreements) **underscores** the value of joint use agreements by demonstrating the costly and time-consuming nature of make-ready pole replacements. This is precisely why joint use agreements are superior infrastructure solutions as compared to pole license agreements—they eliminate the very cost/time that NCTA alleges to be a barrier to deployment. *See* Ex. B at DEP000290-91 (Hatcher Declaration ¶ 19).

and October 2019 meetings, it explained to AT&T the advantages of paying for make-ready based on scheduled (a/k/a "tabulated") costs as opposed to work order costs, but DEP denies the remaining allegations. The scheduled costs set forth in Exhibit B to the joint use agreement are significantly less than actual work order costs. Article VII of the joint use agreement addresses, in detail, how and when the Exhibit B scheduled costs come into play. Though Article VII is chock-full of benefits to AT&T (as the minority pole owner), there are two provisions in particular that illustrate the advantages of scheduled costs as compared to the actual work order costs paid by CATV and CLEC licensees under similar circumstances. First, Article VII.F.4. provides as follows:

> If the existing pole is adequate to support the existing Attachments of both parties and the Licensee requires additional height, the Licensee shall pay the Owner the cost as shown in Table I of Exhibit B and computed based on the size of the pole installed.[60]

Second, Article VII.F.6.b. (addressing cost responsibility when existing pole is inadequate to support existing Attachments) provides as follows:

> If the problem exists because the Licensee's facilities are not installed to meet the Code requirements, the pole shall be replaced and the Licensee shall pay the Owner the full cost as shown in Table I of Exhibit B and computed based on the size of the pole installed.[61]

Thus, if AT&T needs DEP to replace an existing 40-foot pole with a 45-foot pole—either because it needs more space for additional facilities or because it has caused a violation—then AT&T's cost responsibility is limited to the amount set forth in Table I of Exhibit B. The current value in Table I of Exhibit B for any pole 50-foot or less in height is $[redacted].[62] In contrast, if the same

[60] Ex. 1 at DEP000123 (Joint Use Agreement, Article VII.F.4.).

[61] *Id.* at DEP000124 (Joint Use Agreement, Article VII.F.6.b.).

[62] Ex. 5 at DEP000178 (Exhibit B Cost Schedule, Table I).

need arises for one of DEP's CATV or CLEC licensees, the CATV or CLEC licensee would be required to pay actual work order cost.[63] In 2019, the average cost of a pole replacement for DEP was $[redacted].[64] This means that, on average, AT&T pays $[redacted] less for pole replacements than DEP's CATV and CLEC licensees under their pole license agreements.[65] AT&T also alleges that scheduled costs should not differ from actual costs because DEP "unilaterally sets" the scheduled costs and "updated them regularly." Not so. Article VII.K.1. explains the precise manner in which Exhibit B costs are updated:

> Exhibit B revisions are based on the percentage change as shown in Handy Whitman Index and computed by comparing the present year July figure for FERC account 364 to the previous year July figure for FERC account 364. This percentage change will be applied to the costs as shown in the then current Exhibit B.[66]

AT&T either (a) didn't read its joint use agreement before raising this dispute or filing this complaint, or (b) it simply ignores everything that it can't shoehorn into its contrived narrative. From DEP's perspective, it seems to be both. And this speaks volumes about the challenges of dealing with AT&T on this matter.

With respect to the fourth sentence of paragraph 17, DEP denies that AT&T completes any make-ready work that DEP would otherwise perform (such as rearrangements within the electric supply space or pole replacements). On this point, DEP has no idea what AT&T is talking about. If electric supply space make-ready or pole replacements within energized lines are required to accommodate AT&T's modification or expansion of its facilities, DEP performs this work.[67] And,

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[63] *See* Ex. A at DEP000256 (Freeburn Declaration ¶ 24).

[64] *See id.* at DEP000256-57 (Freeburn Declaration ¶ 25).

[65] *See id.*

[66] Ex. 1 at DEP000125 (Joint Use Agreement, Article VII.K.1.).

[67] *See* Ex. A at DEP000259 (Freeburn Declaration ¶ 32).

unlike DEP's CATV and CLEC licensees, **AT&T does not reimburse DEP when DEP transfers or rearranges its electric supply facilities to accommodate AT&T**.[68] With respect to the fifth sentence of paragraph 17, DEP lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding AT&T's cost for "make-ready, engineering, and survey work," but these internal costs incurred by AT&T are irrelevant. The costs that matter are the costs that AT&T is required (or not required) to pay to DEP as compared to what DEP's CATV and CLEC licensees are required to pay. DEP denies any remaining allegations in paragraph 17.

18. DEP admits the allegations in the first sentence of paragraph 18 and admits that "AT&T has historically defended the allocation of space to AT&T at the bottom of the communications space on a pole." DEP denies the allegations in the second sentence of paragraph 18. The joint use agreement most certainly **does** allocate the bottom of the communications space to AT&T. Article III.A. of the joint use agreement, which AT&T cites in support of its clearly false allegation, expressly restricts DEP's use of space below AT&T "to vertical Attachments" (like risers): "CP&L's use of space below BellSouth shall be limited to vertical Attachments unless agreed to by the field representatives and provided all applicable code requirements are met."[69] Further, the immediately preceding joint use agreement (under which the vast majority of jointly used infrastructure was built) specifically designates AT&T's "standard space

[68] *See* Ex. 1 at DEP000122 (Joint Use Agreement, Article VI) ("Except as otherwise expressly provided herein, each party shall place, maintain, rearrange, transfer, and remove its own Attachments at its own expense...."); *see also* Ex. A at DEP000259 (Freeburn Declaration ¶ 32).

[69] Ex. 1 at DEP000121 (Joint Use Agreement, Article III.A.). Further, Article XV.B. states: "For purposes of this Agreement, all Attachments of any such Third Parties shall be treated as Attachments belonging to the Owner, and the rights, obligation and liabilities hereunder of the Owner in respect to such Attachments shall be the same as if it were the actual Owner thereof." In other words, under Article III.A., neither DEP nor any third party is allowed to make attachments beneath AT&T. *See id.* at DEP000129 (Joint Use Agreement, Article XV.B).

allocation" as the bottom of the communications space.[70] The reason AT&T would misrepresent its contractual entitlement to the bottom of the communications space is simple: the bottom of the communications space is a massive contractual benefit which allows AT&T to utilize significantly more space than DEP's CATV and CLEC licensees.

DEP denies the allegations in the third sentence of paragraph 18. AT&T's service affiliate, in comments filed in connection with CTIA's petition for declaratory ruling, was not addressing wireline attachments at all (the subject of the joint use agreement). AT&T's service affiliate, and the CTIA petition more broadly, was addressing ancillary wireless equipment in the so-called "unusable" space—things like equipment boxes, meter bases and radios.[71] In fact, the specific portion of the declaratory ruling cited by AT&T quotes AT&T's service affiliate as saying: "The Commission has already found that wireless attachments to the bottom portions of poles can be safe and feasible, and thus has emphasized that inadequately justified blanket prohibitions against attachments are not permitted, even for portions of the pole that a utility deems 'unusable.'"[72] This had nothing to do with AT&T conceding its allocated space under the joint use agreement at issue in this case, or any joint use agreement for that matter. Regardless, this is a red herring because

[70] Ex. 2 at DEP000140 (1977 Joint Use Agreement, Article I.A.2.).

[71] *See generally, In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Initial Comments of AT&T at 27 (October 29, 2019); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, CTIA's Petition for Declaratory Ruling at 25-27 (Sep. 6, 2019).

[72] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Initial Comments of AT&T at 27 (October 29, 2019) (citing *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7773 at ¶ 134 (Aug. 3, 2018) ("*2018 Order*")).

AT&T is attached in the lowermost position of the communications space, and it is occupying, on average, [redacted] feet of space.

19. The thrust of paragraph 19 is an effort to explain away the benefits of occupying the lowest part of the communications space on DEP's poles. This is a specious claim given that: (a) AT&T obtained the right to occupy the lowest part of the communications space in the 1977 joint use agreement (and possibly before then); (b) AT&T retained the right to occupy the lowest part of the communications space in the current joint use agreement; (c) AT&T has never sought to renegotiate this provision; and (d) AT&T has never suggested that it should raise its wireline facilities on DEP's poles in order to make room for third-party wireline facilities beneath.[73] Though there may, indeed, be certain costs and risks attendant to occupying the lowest part of the communications space, it is safe to assume that those costs and risks are outweighed by the **benefits** of occupying the lowest position on the pole, including ease of access (*i.e.*, no need to work through the lines of other attaching entities) and the ability to sag cable (*i.e.*, which provides greater operational flexibility).[74] To be sure, AT&T has not attempted to quantify either the costs or benefits of its preferred pole position, and DEP does not intend to quantify those costs or benefits, either. So, to the extent AT&T is seeking some sort of "credit" against its other immense per pole net benefits under the joint use agreement, there is nothing to offset.

20. With respect to the first, second and third sentences of paragraph 20, DEP admits that AT&T benefits when DEP replaces AT&T poles following an emergency and further admits that AT&T pays for these pole replacements at the greatly reduced tabulated costs set forth in

[73] *See* Ex. 2 at DEP000140 (1977 Joint Use Agreement, Article I.A.2) (allocating the lowermost three feet of usable space on joint use poles to AT&T); *see also* Ex. A at DEP000253-54 (Freeburn Declaration ¶ 19).

[74] *See* Ex. A at DEP000253 (Freeburn Declaration ¶ 19); Ex. C at DEP000300 (Burlison Declaration ¶ 17).

Exhibit B.[75] DEP denies that "there is no financial benefit to AT&T." As DEP explained during the July 26, 2019 and October 24, 2019 meetings, there are two key benefits: (1) AT&T is able to get this work completed in a timely manner without the cost of carrying crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night at a moment's notice; and (2) AT&T (as set forth *supra* in paragraph 17) pays **scheduled** costs for this work rather than actual work order costs.[76] AT&T postulates that this benefit is really a disadvantage because its competitors are not required to own any poles at all. This postulation misses the point for at least two reasons. First, AT&T is not required to own poles under the joint use agreement. If it were required to own poles, it would own approximately [redacted]% of the jointly used network, no net rentals would exchange hands, and there would not be a complaint proceeding. It is precisely because AT&T is **not** required to own poles that the parties are here in the first place. Second, the financial benefit of AT&T being able to rely on DEP crews, equipment, etc. in times of need supports, rather than undermines, the consideration within the joint use agreement. DEP denies the allegations in the fourth sentence of paragraph 20 for the reasons set forth above.

21. DEP denies the allegations in paragraph 21 and specifically rejects AT&T's interpretation of the 2018 Order. The Commission identified the pre-existing telecom rate as a "hard cap" only with respect to "contracts entered into or renewed after the effective date of [Rule 1.1413]."[77] As set forth above in paragraph 11, the joint use agreement at issue here was neither "entered into" nor "renewed" after March 11, 2019. The current joint use agreement was "entered

[75] *See* Ex. 1 at DEP000123, DEP000124 (Joint Use Agreement, Articles VII.E, VII.F.8).

[76] *See* Ex. A at DEP000255-57, DEP000259-60 (Freeburn Declaration ¶¶ 23-25, 33); Ex. 1 at DEP000123, DEP000124 (Joint Use Agreement, Articles VII.E, VII.F.8).

[77] 47 C.F.R. § 1.1413(b); *see also 2018 Order*, 33 FCC Rcd at 7770-71, ¶¶ 127-29.

into" in 2000 and continues in effect today. Even if the joint use agreement could subsequently be "renewed" after March 11, 2019, this "renewal" could not apply to existing attachments because neither party has the right to terminate the agreement with respect to attachments existing at the time of termination. Without a corresponding right to termination, there can be no "renewal." Similarly, without a right of termination, the joint use agreement cannot be in "evergreen" status. The Commission implicitly recognized the necessity of voluntary acquiescence to the "renewal" when it stated: "We recognize that this divergence from past practice will impact privately negotiated agreements and so the presumption will apply only, as it relates to existing contracts, upon renewal of those agreements."[78] Thus, the agreement can only be "renewed" with respect to future attachments. And, as set forth above, DEP is willing to enter into a license agreement, identical to its license agreement with CLECs, for any and all future attachments.

To be clear, DEP would never have negotiated an agreement like its joint use agreement with AT&T if the most it could recover was the one-foot CATV or telecom rate (old or new).[79] And even more to the point, DEP would never have agreed to give AT&T the right to remain attached to DEP's poles even in the event of a termination.[80] Perhaps this is why the Commission's new ILEC complaint rule is intended to apply to "newly negotiated," "new" or "renewed" agreements—there has to be some sort of voluntary acquiescence by both parties. With respect to existing attachments under the joint use agreement **in this case**, there is no such acquiescence.

Further, in outlining the protocol for implementing its new rule, the Commission clearly identified two distinct temporal categories of joint use agreements and, by implication, an

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[78] *2018 Order*, 33 FCC at 7770, ¶ 127.

[79] *See* Ex. A at DEP000257 (Freeburn Declaration ¶ 26).

[80] *See id.*

important third category. First, paragraph 127 of the 2018 Order states: "We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements."[81] And it was with reference to this presumption that the Commission stated: "If the presumption we adopt today is rebutted, the pre-2011 Pole Attachment Order telecommunications carrier rate is the maximum rate that the utility and the incumbent LEC may negotiate."[82] Second, the Commission specifically carved-out a different—and more flexible—approach for "agreements that materially advantage an incumbent LEC and which were entered into after the 2011 Order and before the effective date of the Order we release today."[83] For this category of agreements, the pre-existing telecom rate serves only as a "reference point"—not a "hard cap."[84] The third temporal category of agreements, by implication, are those agreements "entered into" or "renewed" prior to the effective date of the 2011 Order, which would include the joint use agreement at issue here. And if the rules are progressively more flexible as the temporal category becomes more distant in time, then it stands to reason that an even more flexible approach (*i.e.*, even more flexible than the old telecom rate serving as a mere reference point) would apply to this oldest category of agreements. Further, even if the pre-existing telecom rate serves as a "hard cap" in this case, the pre-existing telecom rate is not a fixed number—it is the product of a formula that depends on a number of variables, as explained in paragraph 22 below.

22. DEP denies the allegations in paragraph 22. The pre-existing telecom rate formula validates, rather than undermines, the justness and reasonableness of the cost sharing arrangement in the joint use agreement. Even assuming AT&T occupies only [redacted] feet of usable space (as set

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[81] *2018 Order*, 33 FCC Rcd at 7770, ¶ 127.

[82] *Id.* at 7771, ¶ 129.

[83] *Id.* at 7770, ¶ 127 n. 475.

[84] *Id.*

forth in paragraph 12 *supra*), and utilizing [redacted] for the average number of attaching entities (which is the actual average on DEP poles to which AT&T is attached),[85] then the pre-existing telecom rate applicable to AT&T under the Commission's formula would yield the following results:

	2017	2018	2019
Pre-Existing Telecom Rate[86]	$[redacted]	$[redacted]	$[redacted]
Contract Rate Paid by AT&T	$[redacted]	$[redacted]	$[redacted]

During this period of time, the pre-existing telecom rate was on average within $[redacted] of the contract rate for AT&T's use of DEP poles. The fundamental flaw in all of AT&T's calculations within its complaint is the presumption that AT&T occupies (and should be allocated) only one foot of pole space on DEP's poles. As set forth above, this presumption is wrong both as a matter of contractual history (the previous joint use agreement allocated [redacted] feet of space to AT&T) and as a matter of fact (field data indicates AT&T is actually occupying at least [redacted] feet of space). And it fails entirely to address the allocation of the communication worker safety zone which, as set forth above, would not have been built into DEP's joint use poles but for the joint use agreement with AT&T. Moreover, simply comparing the per pole rates above glosses over the enormous offset paid by DEP to AT&T on a per pole basis. Even accepting as accurate the data submitted by AT&T, DEP has paid AT&T a per pole rate that **vastly exceeds AT&T's entire annual pole cost** as calculated under the Commission's formula. The chart below identifies the per pole rate paid by DEP to AT&T each year, along with AT&T's actual corresponding annual pole cost:

[85] Ex. A at DEP000260 (Freeburn Declaration ¶ 34).

[86] Ex. D at DEP000308-09 (Harrington Declaration ¶ 16).

	2017	2018	2019
Contract Rate Paid by DEP	$ [redacted]	$ [redacted]	$ [redacted]
AT&T (North Carolina) Annual Pole Cost[87]	$ [redacted]	$ [redacted]	$ [redacted]
AT&T (South Carolina) Annual Pole Cost[88]	$ [redacted]	$ [redacted]	$ [redacted]

If there is any "overcharge" in this relationship (as alleged by AT&T in the last sentence of paragraph 22), it is the incredible overcharge for DEP's use of 31,000 AT&T poles in North Carolina and South Carolina.

B. The Cost-Sharing Arrangement in the Existing Joint Use Agreement Is Just and Reasonable and Has Been Just and Reasonable Since Long Before 2011.

1. AT&T never challenged or otherwise questioned the cost-sharing methodology in the joint use agreement until May 22, 2019.

23. DEP admits that AT&T could have filed a pole attachment complaint as early as July 12, 2011 if it believed that its rates under the joint use agreement were unjust or unreasonable, but DEP denies that the cost-sharing arrangement within the existing joint use agreement yields unjust or unreasonable rates. Perhaps more importantly, **for all it appears, AT&T itself viewed the joint use agreement as just and reasonable until very recently**. Despite its rights under the law since July 12, 2011, AT&T first challenged the cost sharing methodology in the existing joint use agreement on May 22, 2019.[89] Further, AT&T expressly affirmed the correctness of the rates each year through 2018. That is, DEP provided the updated rates (per Handy Whitman adjustment,

[87] This statement of AT&T North Carolina's annual pole cost presumes the accuracy of the data submitted by AT&T witness Daniel Rhinehart. *See* AT&T's Pole Attachment Complaint, Ex. C at ATT00018 (Affidavit of Daniel P. Rhinehart, Aug. 31, 2020, Ex. R-3).

[88] This statement of AT&T South Carolina's annual pole cost presumes the accuracy of the data submitted by AT&T witness Daniel Rhinehart. *See* AT&T's Pole Attachment Complaint, Ex. C at ATT00019 (Affidavit of Daniel P. Rhinehart, Aug. 31, 2020, Ex. R-3).

[89] *See* Ex. A at DEP000258 (Freeburn Declaration ¶ 28).

as set forth in Article XIII.C. of the joint use agreement) to AT&T each year.[90] After review and approval, AT&T sent its "Form 6407" to DEP indicating its agreement with the rates.[91] Then, after receiving the "Form 6407" from AT&T, DEP sent the invoice for annual rentals. DEP denies any remaining allegations in paragraph 23 for all of the reasons set forth above and all of the reasons set forth below in paragraphs 24-30.

24. DEP denies the allegations in paragraph 24. First, as set forth above, the contract rates paid by AT&T since 2017 are well **below** the rate a CATV or CLEC licensee occupying the same amount of space would have paid under the Commission's cable and new telecom rate formulas.[92] Second, as also set forth above, the contract rates paid by AT&T since 2017 are, on average, within $[redacted] of the rates yielded by the Commission's pre-existing telecom rate formula (using the proper amount of usable space occupied and the actual average number of attaching entities).[93] In short, **the Commission's formulas affirm rather than undermine the justness and reasonableness of the contract rates in the joint use agreement**.

25. DEP denies that the cost-sharing arrangement in the joint use agreement "disproportionately divide[s] annual pole costs between AT&T and Duke Energy Progress." The joint use agreement doesn't technically "divide annual pole costs" at all. The agreement identifies particular rates to be paid by each party with a designated manner of adjusting the rates up or down each year. Though it is correct that, if AT&T owned [redacted]% of the jointly used poles, it would pay $0 in net annual rental, this is an entirely different proposition than being required to carry [redacted]% of the cost of the jointly used network. If AT&T actually owned [redacted]% of the jointly used network

[90] *See id.* at DEP000257 (Freeburn Declaration ¶ 27).

[91] *See id.* at DEP000269-80 (Freeburn Declaration, Ex. A-3).

[92] *See supra* ¶ 12.

[93] *See supra* ¶ 22.

(approximately [redacted] poles), and assuming its ownership was allocated between North Carolina and South Carolina similar to the current allocation, AT&T's annual carrying cost of the jointly used network would be $[redacted] million (based on annual pole cost for year ending 12/31/18). If DEP owned merely [redacted]% of the jointly used network (approximately [redacted] poles), DEP's annual carrying cost of the jointly used network would be $[redacted] million (based on annual pole cost for year ending 12/31/18). Under this scenario, AT&T would actually be carrying less than [redacted]% of the combined cost of the jointly used network, and its share of costs would be approximately [redacted]% of DEP's share of costs.[94]

DEP also denies that it is "occupying far more space on a pole" than AT&T. Though this may be true with respect to joint use poles owned by AT&T, it is not true with respect to joint use poles owned by DEP. The original premise of the joint use agreement was that AT&T and DEP could both save money and right-of-way clutter by sharing a single network of poles, rather than each party constructing a redundant network.[95] For this reason, the parties evenly divided those network costs that inured equally to the parties' benefit—such as the underground portion of the pole necessary for vertical support, the above ground portion of the pole up to the point of minimum grade clearance, and the communication worker safety zone—while allocating pro rata

[94] AT&T hypothesizes in footnote 65 that "when there are 4 communications attachers on a pole…Duke Energy Progress collects nearly two-thirds of its pole costs from communications attachers." AT&T's Pole Attachment Complaint at ¶ 25 n.65. The actual facts (known to AT&T since the July and October 2019 meetings) disprove this unnecessary hypothesis. On DEP poles to which AT&T is attached, there are, on average, [redacted] additional attaching entities. *See* Ex. A at DEP000260 (Freeburn Declaration ¶ 34). Based on data applicable to the 2019 billing year, AT&T's rate was equivalent to [redacted]% of DEP's annual pole cost. Assuming the other [redacted] attaching entity was a CATV or CLEC paying the one-foot rate, this means DEP recovered an additional [redacted]% of its annual pole cost, for a total of [redacted]% recovery—far less than the 2/3 alleged by AT&T.

[95] *See* Ex. A at DEP000247 (Freeburn Declaration ¶ 7); Ex. B at DEP000283 (Hatcher Declaration ¶ 5).

the portions of the network that did not inure equally to the parties' benefit. If these common costs are no longer to be shared in accordance with the original premise of the joint use agreement, then the cost-causer should pay those costs. And, on joint use poles owned by DEP, AT&T is the cost-causer of more than [redacted] feet of space as set forth above. This [redacted] feet of space represents more than [redacted]% of the presumed amount of usable space on a joint use pole owned by DEP ([redacted]/13.5=[redacted]).

DEP also denies that it cannot "reserve" space on its poles for AT&T. This certainly has not been AT&T's historical position. Further, the preceding joint use agreement described AT&T's [redacted]-foot space allocation as dedicated for its "exclusive use," and the current joint use agreement states:

> The parties agree that all existing Attachments to poles used jointly by the parties shall continue to exist in their current condition as of the date of this Agreement and nothing contained herein shall be construed as requiring either party to remove, transfer, or rearrange any such existing Attachments.[96]

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[96] Ex. 1 at DEP000121 (Joint Use Agreement, Article III.B.). Though the data regarding AT&T's actual utilization of its reserved space renders the point moot, AT&T appears to argue in footnote 68 that the contractual reservation of space set forth in the joint use agreement is somehow contrary to the law. *See* AT&T's Pole Attachment Complaint at ¶ 25 n.68. AT&T misunderstands the law and its purpose, as it relates to the reservation of space. The portion of the Local Competition Order cited by AT&T relates specifically to an ILEC's reservation of space for itself on its own poles. The preceding paragraph in the same order is the portion that actually addresses an electric utility's reservation of space on its poles. There, the Commission stated: "We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Rcd 15499, 16078 at ¶ 1169 (Aug. 8, 1996) ("*Local Competition Order*"). The Commission went on to specifically distinguish this principle from the reservation of space rules relating to ILEC pole owners stating, with respect to ILEC pole owners, that "we believe the statute requires a different result" given the ILECs' anti-competitive motives toward other attaching entities. *Id.* at 16079, ¶ 1170. Joint use agreements (and the reservation of space for an ILEC counterparty that comes with it) are a crucial component of an electric utility's plan for ensuring ubiquitous shared infrastructure that allows it to deliver electric service to its customers at low cost. *See* Ex. B at DEP000283, DEP000284 (Hatcher Declaration ¶¶ 5, 7). But

AT&T further alleges that it "required space comparable to its competitors." This is just plain wrong, at least with respect to AT&T's **existing** attachments.[97] AT&T submitted no data at all to support this assertion (because no such data exists). Moreover, the actual data from the field demonstrates that AT&T actually occupies at least [redacted] feet of space on DEP's poles.[98]

2. If the Commission unwinds the cost-sharing arrangement in the joint use agreement, then the communication worker safety zone on joint use poles owned by DEP should be assigned to AT&T.

DEP also specifically denies that it "occupies 10.5 feet of space" on its own poles "under the FCC's rate assumptions." This allegation is premised on the false and unlawful notion that the communication worker safety zone (a/k/a "safety space") on DEP poles should be assigned to DEP. As set forth above, **DEP does not need and does not use the communication worker safety zone on its own poles**.[99] This space, which is typically 40" (3.33 feet), would not have been built into DEP's pole network in its overlapping service area with AT&T but for the joint use agreement.[100] The communication worker safety zone on DEP poles serves no purpose in the provision of electric service—it exists only to benefit attaching entities within the communications space.[101] Given that the communication worker safety zone is deemed to be "usable space" under

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perhaps more importantly, AT&T has lost sight of the fact that the Commission's reservation of space rules are cost allocation rules that protect CATVs and CLECs—they don't impose any costs on ILECs when it comes to reserved space on electric utility poles.

[97] As set forth above in paragraph 11, DEP is willing to enter into a standard pole license agreement with AT&T for new attachments.

[98] *See* Ex. A at DEP000248 (Freeburn Declaration ¶ 9).

[99] *See* Ex. A at DEP000252-53 (Freeburn Declaration ¶ 18); Ex. B at DEP000285 (Hatcher Declaration ¶ 9); Ex. C. at DEP000297 (Burlison Declaration ¶ 8).

[100] *See* Ex. C at DEP000296-98 (Burlison Declaration ¶¶ 6-12).

[101] *See id.* at DEP000296-97 (Burlison Declaration ¶ 7-8).

the Commission's rules, and given that the Commission has decided not to assign any of this space to CATV or CLEC attachments, then the cost of the space must be assigned to AT&T. It would make no sense at all for DEP and its electric ratepayers to bear any portion of this cost—let alone all of it—given that it has no relevance to the provision of electric service. Moreover, if the Commission is abandoning the negotiated cost-sharing arrangements of the joint use agreement, it makes sense to assign the costs of the communication worker safety zone to the "cost causer,"[102] which in this case is AT&T (as AT&T was almost always the first communications attachment on DEP's poles in their overlapping service areas).[103]

Though DEP will reserve full briefing on this issue for later in the case, suffice it to say that the law regarding the allocation of safety space is remarkably misunderstood and misapplied. In its original order deciding not to allocate the safety space to CATVs, the Commission stated:

> [W]e believe that the risk for maintaining this safety space effectively falls squarely on the CATV operator. Therefore, it is difficult to accept, in equity, arguments that seek to further assign part of the 40-inch safety space to the CATV operator.[104]

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[102] *See, e.g., In the Matter of Investigation of Interstate Access Tariff Non-Recurring Charges*, Memorandum Opinion and Order, Docket No. 85-166, 2 FCC Rcd 3498, 3502 at ¶ 34 (Jun. 11, 1987) ("Absent a convincing showing, [the Commission] believe[s] the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer."); *2011 Order*, 26 FCC Rcd at 5301, ¶ 143 ("Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost."); *2018 Order*, 33 FCC Rcd at 7766, ¶ 121 (clarifying that new attachers cannot be held responsible for the costs of correcting preexisting violations because the new attacher *did not cause* the preexisting violations).

[103] AT&T's Pole Attachment Complaint, Ex. C at ATT00045 (Affidavit of Mark Peters, Aug. 31, 2020, ¶ 21) (noting that "in the early days of joint use [*i.e.*, when DEP's network was initially constructed]...AT&T was the only consistent communications attacher on utility poles at that time.").

[104] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, Docket No. 78-144, 72 F.C.C.2d 59, 71 at ¶ 24 (May 23, 1979) ("*1979 Order*").

This rationale, of course, does not apply to AT&T because the risk of maintaining the safety space falls on either DEP or a subsequent attaching entity who is required to pay for make-ready in order to maintain the safety space. Moreover, underlying the Commission's decision to not allocate the communication worker safety zone to CATVs was the recognition that the cost of this space was already addressed in ubiquitous joint use agreements: "In joint-use agreements that involve the assignment of muniments of ownership and use between electric and telephone utilities, sharing responsibility for the safety space may be an issue."[105] The ILECs (then simply known as the "telephone companies") actually sought reconsideration of the Commission's decision to not allocate any of the safety space to CATVs on the grounds that it required them to bear the entire cost of the safety space on their own poles. In rejecting the ILECs' request for reconsideration, the Commission stated:

> Moreover, as the record shows, **telephone companies in the past have worked out their own agreements with the electric companies as to how much of the remaining space is to be allocated to each utility**. Under these circumstances, the claim by the telephone companies that they are bearing responsibility for the entire safety space is simply untenable.[106]

In other words, a significant part of the Commission's rationale for not assigning any part of the safety space to CATV attachments (and later, CLEC attachments) was the fact that the cost of this space was already addressed and shared in joint use agreements between telephone companies and electric utilities. It would be the ultimate bootstrap to now excuse AT&T from bearing the cost of the communication worker safety zone because of a rule applicable to CATVs that was built on the foundation of joint use agreements like the one between DEP and AT&T.

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[105] *Id.* at 71, ¶ 25.

[106] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, CC Docket No. 78-144, 77 F.C.C.2d 187, 190 at ¶ 9 (Mar. 10, 1980) (emphasis added).

AT&T also alleges in the last sentence of paragraph 25 that the safety space is "usable and used by the electric utility." AT&T cites two authorities in support of this proposition: (1) the Enforcement Bureau's order in the *AT&T v. FPL Decision*; and (2) a 2001 Commission order. Whatever the facts may have been that supported such a finding in the *AT&T v. FPL Decision* or in the 2001 Commission order, those facts are not present (or are no longer relevant) in the case at bar. The *AT&T v. FPL Decision*, for its part, relies on the following statement from a 2000 Commission order: "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers."[107] Though this is indeed a fair statement when it comes to poles owned by AT&T, this rationale cannot withstand legitimate scrutiny with respect to poles owned by DEP. **On poles owned by DEP, it is the presence of communications attachments—not the presence of electric lines—that makes the communication worker safety zone necessary**. The 2001 Commission order, which of course in no way addresses whether or to what extent the safety space should be allocated to ILECs, relies on the Commission's original decision in 1979 to not allocate the safety space to CATVs.[108] This 1979 order, which (as noted above) presumed electric utilities and ILECs were already sharing the cost of the safety space through their joint use agreements, found that some electric utilities were utilizing the safety space "by mounting street light support brackets, step-down distribution transformers, and grounded,

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[107] *AT&T v. FPL Decision*, 35 FCC Rcd at 5330, ¶ 16 (quoting *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6467 at ¶ 22 (Apr. 3, 2000) ("*2000 Order*")).

[108] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, CS Docket No. 97-151, 16 FCC Rcd 12103, 12130 at ¶ 51 n.186 (May 25, 2001) (citing *2000 Order*, 15 FCC Rcd at 6467, ¶¶ 21-22 (citing *1979 Order*, 72 F.C.C.2d at 71, ¶ 24)).

shielded power conductors" within the safety space.[109] Though street lights are occasionally mounted within the communication worker safety zone on DEP's poles, the communication worker safety zone is not necessary for the proper installation of a streetlight.[110] Streetlights can be, and often are, safely mounted within the electric supply space.[111] In other words, if there is no communication worker safety zone on a distribution pole, DEP can still safely install a streetlight on that pole. AT&T's attachments on DEP's poles—not DEP's streetlights—caused the need for the communication worker safety zone. Also, transformers are not mounted in the communication worker safety zone.[112] The presence of a transformer may change the **location** of the communication worker safety zone; however, the transformer is never within the communication worker safety zone, and the presence of a transformer does not reduce the 40" communication worker safety zone on a DEP pole.[113] Finally, the presence of vertical shielded conductors cannot be considered the utilization of space. If it is, then it means that communications attachments with risers to the bottom of the pole (including, but not limited to, pole top small cell attachments) are "using" the entire pole.[114]

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[109] *1979 Order*, 72 F.C.C.2d at 71, ¶ 24.

[110] *See* Ex. A at DEP000252-53 (Freeburn Declaration at ¶ 18); Ex. C at DEP000297 (Burlison Declaration ¶ 9).

[111] *See* Ex. C at DEP000297 (Burlison Declaration ¶ 9).

[112] *See id.* at DEP000297 (Burlison Declaration ¶ 10).

[113] *See* Ex. A at DEP000252-53 (Freeburn Declaration at ¶ 18); Ex. C at DEP000297 (Burlison Declaration ¶ 10).

[114] *See, e.g., 1998 Report and Order*, 13 FCC Rcd at 6799, ¶¶ 41-42 (acknowledging the differences between wireline and wireless attachments and stating that "[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted"); *2011 Order*, 26 FCC Rcd at 5306, ¶ 153 (reaffirming that, for purposes of calculating annual rental, pole owners can rebut the one-foot presumption by demonstrating that a wireless attachment occupies more than one foot of space on a pole).

The bottom line is that whatever rationale may have once supported excusing CATV attachments from sharing in the cost of the communication worker safety zone is either no longer valid or cannot apply to AT&T's use of DEP's poles. No sound ratemaking rationale would support allocating such a cost to DEP and its electric ratepayers.[115] For ratemaking purposes, this space should be assigned to AT&T (and, conversely, to DEP with respect to joint use poles owned by AT&T).

26. DEP denies that its relative pole ownership was either an "advantage" or that it "continuously impacted AT&T's ability to negotiate a just and reasonable rate over time." First, owning more than 80% of the joint use network is a burden, not an advantage. To put this in financial perspective, DEP's annual pole cost based on year ending 2018 data was $[redacted].[116] This means, according to the Commission's formula, it costs DEP $[redacted]/year to own a single pole. On the other hand, the per pole rate paid by DEP to AT&T under the joint use agreement for this same period was $[redacted]. In other words, it is almost [redacted]% cheaper for DEP to rent, rather than own, joint use poles.

Second, the notion that relative pole ownership affects the ability to negotiate is not merely incorrect—it is a foundational error. For this to be true, DEP would need the ability to kick AT&T off its poles. Otherwise, what leverage is there to exercise? As set forth above, DEP lacks the contractual ability to kick AT&T off its poles.[117] For AT&T's allegation of "bargaining leverage"

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[115] *See* Ex. D at DEP000309 (Harrington Declaration ¶ 17); Ex. E at DEP000339-40 (Metcalfe Declaration ¶ 33) ("From an economic cost-causation perspective, and under the current circumstances, it would be more equitable to allocate 100% of the safety space to the licensee.").

[116] *See* Ex. D at DEP000305 (Harrington Declaration ¶ 10).

[117] Given that neither party can kick the other off its poles, and given that DEP has already communicated its willingness to enter into a "CLEC" agreement with AT&T for future attachments, it cannot be credibly alleged that DEP has superior bargaining leverage. With respect to existing attachments, DEP has exactly the same bargaining leverage as AT&T—**zero**. Much as AT&T has no unilateral leverage to reduce it cost sharing obligations, DEP has no unilateral

to have any merit, one of two additional conditions would also need to exist, either: (1) the joint use agreement was unjust and unreasonable at the time it was first executed; or (2) DEP subsequently wielded a growing pole ownership imbalance to its financial benefit. Neither condition has been alleged, and neither condition exists.

AT&T cannot credibly contend that the joint use agreement executed in 2000 was unjust or unreasonable. To its credit, AT&T does not even make such an allegation. And for good reason. AT&T's own internal standards from the 1970s identify a [redacted]% split as the "most equitable" division of costs.[118] The same standards identify a [redacted]% division of costs as "almost as good" as the "most equitable" method.[119] The implied target pole ownership in the joint use agreement is [redacted]%. In other words, it is squarely between AT&T's self-stated "most equitable" and "almost as good" targets. And, perhaps more importantly, **until May 22, 2019, AT&T never once complained to DEP that the cost-sharing arrangement in the joint use agreement was unfair, unreasonable, unjust, inaccurate, outdated, outmoded or otherwise in need of revision**. To the contrary, in each year placed at issue in AT&T's complaint (and for many years prior), AT&T certified the correctness of both the number of poles invoiced and the applicable rates.[120] This "certification" process isn't something DEP forced on AT&T, either—it is AT&T's prompting, and AT&T's form (Form 6407), that leads to this yearly certification. The notion that the contract rates are, or have ever been, unjust and unreasonable is not just wrong

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leverage to increase AT&T's cost sharing obligations. The "bargaining leverage" myth might exist in a hypothetical economic vacuum. Or it might even exist where one party can force the other off its poles. **But it does not exist here**. This is not merely a matter of advocacy or opinion. It is a matter of undisputed contractual fact.

[118] *See* Ex. 6 at DEP000196 (AT&T's Internal Division of Cost Circular at p. 17).

[119] *See id.*

[120] *See* Ex. A at DEP000257, DEP000269-80 (Freeburn Declaration ¶ 27, Ex. A-3).

under the specific facts of this case—it is specifically contrary to AT&T's own actions and its own internal documents.

Though it is true, as AT&T alleges in the final sentence of paragraph 26, that the rate provision in the joint use agreement "cannot be changed without Duke Energy Progress's agreement," the same is true for AT&T. Neither party can change the rate provision without the other party's agreement, and neither party can kick the other off its poles. As set forth in the affidavit of Mr. Kenneth P. Metcalfe, CPA, CVA, the inability of DEP to force AT&T to remove its attachments "effectively obviates any real or perceived bargaining power that might otherwise come with increased pole ownership."[121] DEP denies any remaining allegations in paragraph 26.

27. DEP denies that either party to the joint use agreement is indefinitely "stuck" paying rentals to the other party in accordance with the joint use agreement. Neither party is required to keep its facilities attached to the other party's poles. Both parties retain the right at any time to remove some or all of their facilities from the other's poles.[122] If AT&T were to remove its facilities from some or all of DEP's poles, it would no longer be bound to pay an annual rate on those poles. DEP admits that the joint use agreement contains an "evergreen" provision (at least with respect to poles not already in joint use) but denies that AT&T has correctly identified it. An "evergreen" provision is a provision that indefinitely extends the expiration date of a contract.[123] Article XVII.A. of the joint use agreement includes such a provision:

> This Agreement, effective as of the date set forth above, shall continue in force until terminated by either party as set forth below, or as otherwise provided herein.[124]

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[121] Ex. E at DEP000 347(Metcalfe Declaration ¶ 51).

[122] *See* Ex. 1 at DEP000128 (Joint Use Agreement, Article XII.C.).

[123] *See supra* note 28.

[124] Ex. 1 at DEP000130 (Joint Use Agreement, Article XVII.A.).

The provision that AT&T mistakenly claims to be an "evergreen" clause is actually a perpetual license, exercisable at the licensee's option. Article XVII.B. states:

> Any such termination of the right to make additional Attachments shall not, however, abrogate or terminate the right of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement.[125]

As set forth above, where DEP lacks the ability to terminate AT&T's license with respect to any existing attachments, there can be no "renewal" of the joint use agreement with respect to existing attachments. Similarly, the agreement cannot be in "evergreen" status with respect to existing attachments given that "evergreen" status is nothing more than an indefinite renewal, pending termination by either party. In this situation (as it relates to AT&T's facilities on DEP's poles), it is DEP—not AT&T—that is "forced" to continue the relationship; AT&T is the only party with a choice in the matter.

With respect to the fourth, fifth and sixth sentences of paragraph 27, DEP admits that AT&T sent a one-page letter to DEP and its affiliate, Duke Energy Florida, LLC, dated May 22,

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[125] *Id.* at DEP000130 (Joint Use Agreement, Article XVII.B.). So long as the basis of the bargain is not fundamentally altered, DEP is content to abide by the intent of this provision. If the basis of the bargain is fundamentally altered, though, DEP reserves the right to challenge this perpetual license provision as unenforceable under North Carolina and South Carolina law. *See, e.g., Lattimore v. Fisher's Food Shoppe, Inc.*, 329 S.E.2d 346, 349 (N.C. 1985) (noting that "[p]erpetual leases and covenants for perpetual renewals are not favored and shall not be enforced unless the intent to create them is shown by clear and unequivocal terms in the lease agreement" and adopting "a 'bright-line' rule requiring that these customary words of perpetuity [*i.e.*, "forever", "for all time", or "in perpetuity"] or terms *unmistakably* of the same import must expressly appear in a lease agreement in order to create any such [perpetual] rights") (italics in original); *Carolina Cable Network v. Alert Cable TV*, 447 S.E.2d 199, 201 (S.C. 1994) "[W]here the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.") (quoting *Childs v. City of Columbia*, 70 S.E. 296, 298 (S.C. 1911)).

2019, which requested a meeting "to determine the appropriate rental rates for our companies." DEP further admits the parties met face-to-face on July 26, 2019 and October 24, 2019, but DEP denies that it "has not made AT&T a single offer." By letter dated September 10, 2020, DEP transmitted an adjusted cost sharing proposal to AT&T that, if accepted, would result in [redacted] over the life of the proposed deal.[126] As of the date of this answer—more than two months after transmitting the proposal—AT&T has neither responded to the proposal nor indicated whether it even intends to respond to the proposal.[127] DEP denies the allegation in the seventh sentence of paragraph 27 that AT&T "genuinely lacks the ability to obtain a new [cost sharing] arrangement." As set forth above, AT&T obviously has this ability given that DEP has offered a new arrangement (and one that would, if accepted, result in [redacted]). Moreover, as set forth above, DEP proposed a "new arrangement" for new attachments, but AT&T was not interested. AT&T was only interested in a windfall reduction of its obligations with respect to existing attachments (made under the immense net benefits of the joint use agreement).

28. For all of the reasons set forth above, DEP denies that AT&T has been entitled to the new telecom rate since the effective date of the 2011 Order. If this were true, AT&T would have raised this at some point prior to May 22, 2019. Moreover, if this allegation were true, AT&T would not have certified the accuracy of the annual rates in all years prior to its first notice of dispute on May 22, 2019. DEP also denies, for all of the reasons set forth above, that AT&T is entitled to the new telecom rate under the Commission's new ILEC complaint rule. To the extent AT&T did not believe DEP had adequately explained the immense net benefits inuring to AT&T under the joint use agreement prior to now, the evidence described herein and as attached hereto

[126] *See* Ex. B at DEP000291 (Hatcher Declaration ¶ 20).

[127] *See id.*

conclusively establishes these net benefits.[128] DEP denies any remaining allegations in paragraph 28.

29. DEP admits that the 2011 Order stands for the proposition that similarly situated attaching entities should pay similar rates, but DEP denies any implication that AT&T is similarly situated to DEP's CATV and CLEC licensees. AT&T has **never** been similarly situated to DEP's CATV and CLEC licensees, and given the irreversible benefits of incumbency achieved through the joint use agreement, it never will be (at least with respect to existing facilities). Aside from the fact that AT&T is not, and has never been, similarly situated to DEP's CATV and CLEC licensees, it simply defies common sense to suggest that AT&T has been entitled to a different cost-sharing arrangement since July 12, 2011, given that AT&T never took exception to the existing cost-sharing arrangement (and in fact "certified" its correctness annually) until May 22, 2019. DEP also denies, for the reasons set forth herein, that the advantage AT&T enjoys over DEP's CATV and CLEC licensees is "generalized"—it is specific in concept, application, and now economic terms. DEP denies any remaining allegations in paragraph 29.

30. DEP admits that any analysis of competitive neutrality should account for the different rights and responsibilities in joint use agreements and license agreements, but denies that anything in the joint use agreement is a "disadvantage" to AT&T as compared to the rights and responsibilities within the agreements governing DEP's CATV and CLEC licensees. The second

[128] DEP should not have to engage in a full-fledged offer of proof and financial valuation in order to get AT&T off square one. When DEP explained the types of net benefits it would quantify if required to do so, AT&T merely dismissed them with unconsidered talking points about the "reciprocal" nature of those sources of net benefits. *See id.* at DEP000287 (Hatcher Declaration ¶ 13). DEP never disputed that those benefits were, indeed, reciprocal—DEP's position was and remains (and has now been demonstrated in economic terms through the testimony of Mr. Kenneth P. Metcalfe, CPA, CVA and others) that those "reciprocal" benefits disproportionately inure to the benefit of AT&T under the particular relationship at issue here.

and third sentences of paragraph 30 allege, astoundingly, that AT&T's burdens as a joint use pole owner are equally as heavy as DEP's. AT&T offers no quantification to support this allegation, and for good reason—the actual quantification emphatically **disproves** the allegation. Based on current joint use pole ownership and year ending 12/31/18 data, DEP is currently carrying $[redacted] in joint use pole costs, annually.[129] AT&T, on the other hand, is carrying barely over $[redacted] in joint use pole costs, annually.[130] Though it is true, as alleged in the fourth sentence of paragraph 30, that CLECs and CATVs generally do not own poles at all, it is also true that DEP's network is not constructed on the front end to accommodate CATVs and CLECs. CATVs and CLECs are relegated to the "leftover" space, if any. And if there are no "leftovers," the CATVs and CLECs pay for new poles or other make-ready and wait for the new poles to be installed or the make-ready to be performed. Perhaps more to the point, AT&T is not (as alleged in both the second and fourth sentences of paragraph 30) required to own poles. One of the benefits to AT&T is that it is **not** required to own any poles at all. But when DEP builds and maintains poles specifically for AT&T's benefit, then AT&T is required to pay for it.

Moreover, AT&T's underlying allegation that ownership of poles is a "disadvantage" is ironic given that AT&T claims in the same complaint to be disadvantaged by **not** owning poles.[131] In fact, the alleged disadvantages of not owning enough poles was the entire basis for the Commission's original assertion of jurisdiction over ILEC attachments on electric utility poles in

[129] DEP's annual pole cost ($[redacted]) x number of joint use poles owned by DEP (148,000) = $[redacted].

[130] AT&T South Carolina's annual pole cost ([redacted]) x number of joint use poles owned by AT&T in South Carolina (4,512) = $[redacted]. AT&T North Carolina's annual pole cost ($[redacted]) x number of joint use poles owned by AT&T in North Carolina (26,086) = $[redacted]. These two figures combined equal $[redacted].

[131] *See, e.g.*, AT&T's Pole Attachment Complaint at ¶ 26.

2011.[132] And it was the reason the Commission went even further in 2018.[133] Which is it? Is pole ownership an advantage or disadvantage in a joint use relationship? AT&T cannot have it both ways. If pole ownership is indeed a disadvantage, then it is one that inures to AT&T's net benefit, given that DEP owns 148,000 poles in the jointly used network (with an annual carrying cost of [redacted]) and AT&T owns only 31,000 (at an annual carrying cost of less than $[redacted]).

DEP denies the allegations in the fifth sentence of paragraph 30. As set forth above, AT&T enjoys a massive competitive advantage by virtue of the fact that the joint use agreement expressly allows AT&T to remain attached to DEP's poles even if the joint use agreement is terminated (for convenience or default). In contrast, for example, DEP's standard CLEC license agreement provides:

> Upon termination of this Agreement, Licensee shall, within sixty (60) days: (i) remove all of its Attachments from Licensor's Poles; and (ii) advise Licensor of the date on which such Attachments were removed and affected Poles repaired. If any Attachments are not so removed within sixty (60) days following such termination, Licensor shall have the right to: (a) remove Licensee's Attachments without liability, and Licensee shall reimburse Licensor for the associated costs plus an additional 50% of such costs; and (b) seek the payment of holdover fees, on a monthly basis, at the Pole Attachment License Fee rate.[134]

Further, AT&T's allegation that it "may be denied the right to attach to new pole lines at any time" is inconsistent with the actual provisions of the joint use agreement. The recitals set forth the overarching premise: "CP&L and BellSouth desire to continue Joint Use of poles **and in the future to establish further Joint Use of their respective poles** when and where Joint Use shall

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[132] *2011 Order*, 26 FCC Rcd at 5327, 5328-29 at ¶¶ 199, 206.

[133] *2018 Order*, 33 FCC Rcd at 7768-69, ¶¶ 125-126.

[134] *See* Ex. 7 at DEP000223 (Exemplar CLEC Pole Attachment License Agreement, Section 17). The deadline by which CATV and CLEC licensees are required to remove their attachments from DEP's poles varies and can be as long as 180 days in some pole license agreements.

be of mutual advantage."[135] Where there is mutual advantage (part of which are the reciprocal cost sharing obligations), there is joint use. The letter and spirit of the agreement is pro-access. AT&T has not alleged, nor could it, that the implementation of the joint use agreement has been anything but the fulfillment of its letter and spirit.[136] DEP denies the allegations of the sixth (final) sentence of paragraph 30.

C. AT&T Should Continue to Share in the Cost of the Jointly Used Network as Set Forth in the Joint Use Agreement.

1. AT&T's calculation of the "one-foot" rate applicable to DEP's CATV and CLEC licensees is incorrect.

31. DEP denies that AT&T is entitled to the new telecom rate with respect to any existing joint use poles at any time in the past or on a going-forward basis. In the July 26, 2019 meeting, DEP proposed that AT&T enter into a new pole license agreement (at the Commission's new telecom rate) that would cover any new attachments.[137] AT&T expressed no interest in this proposal.[138] Despite rejecting DEP's proposal, AT&T asserts that it is entitled to the new telecom rate for **all** attachments (existing and future) and provides its calculations of the one-foot new telecom rate for 2017-2019. AT&T's calculations of DEP's one-foot CLEC pole attachment rates for the period 2017-2019 are close, but not entirely accurate. The proper per foot calculations

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[135] Ex. 1 at DEP000119 (Joint Use Agreement, Recitals at p. 1).

[136] AT&T indirectly alleges that CATV and CLEC licensees have an advantage over AT&T because of "statutorily guaranteed access." This is of no consequence to the analysis under the parties' respective agreements. DEP cannot control what Congress gives or does not give to CATVs and CLECs. DEP can only control what contractual terms it gives to CATVs and CLECs. In any event, if AT&T's contractual rights are compared against something extracontractual, this would be comparing apples and oranges which would completely distort the analysis of competitive neutrality.

[137] *See* Ex. B at DEP000289 (Hatcher Declaration ¶ 17).

[138] *See id.*

applicable to DEP's CATV and CLEC pole licensees, as set forth in paragraph 12 *supra*, are as follows:[139]

	2017	2018	2019
CATV			
CLEC			

Importantly, though, AT&T does not occupy one foot of space on DEP's poles. As set forth above, AT&T actually occupies at least [redacted] feet of space, and AT&T is the cost-causer of 3.33 feet of additional space on DEP's poles.[140] If these per foot rates were applied to AT&T based on its occupancy levels (using a conservatively expressed [redacted] feet), it would yield rates for the corresponding periods as follows:[141]

	2017	2018	2019
CATV Rate			
CLEC Rate			
Contract Rate paid by AT&T (per pole)			

DEP denies any remaining allegations in paragraph 31.

32. DEP denies the allegations in the first sentence of paragraph 32. The Commission should instead find that the cost-sharing provisions of the existing joint use agreement—which AT&T first questioned by letter dated May 22, 2019—are just and reasonable. DEP denies that the Commission should order a refund of **any** amounts to AT&T. The facts of this case demonstrate that the cost-sharing provisions in the existing joint use agreement are just and reasonable—if not favorable to AT&T. But in any event, as set forth above, AT&T did not even question the parties' cost-sharing arrangement until May 22, 2019 (despite having the right to do

[139] Ex. D at DEP000285-86 (Harrington Declaration ¶ 10).

[140] *See supra* ¶¶ 12, 25.

[141] Except for the usable space occupied by AT&T, these calculations use the same presumptions set forth in the final sentence of paragraph 31 of AT&T's complaint.

so at any prior time and despite having a specific regulatory remedy to pursue since 2011). Given this fact alone, AT&T should be estopped from claiming or obtaining any sort of refund prior to the 2019 billing year. The Commission stated in its 2018 Order:

> Because our intention is to encourage broadband deployment going forward, we decline to adopt USTelecom's proposal that we give incumbent LECs "the right to refunds for overpayment as far back as the statute of limitations allows."[142]

Moreover, more than two-thirds of the period for which AT&T seeks a refund is comprised of billing years governed by the Commission's **old** ILEC complaint rule. Under the old rule, AT&T—not DEP—bears the burden of proof.[143] AT&T has not even attempted to meet this burden.[144]

2. The 3-year statute of limitations for contract actions in North Carolina is not applicable to this case.

With respect to the second, third, fourth, fifth and sixth sentences of paragraph 32, DEP denies that the "applicable statute of limitations" is the three-year statute of limitations period set forth in Section 1-52(1) of the North Carolina General Statutes. The Commission has never explained what is meant by the "applicable statute of limitations" for purposes of rule 1.1407(a)(3), and Section 224 does not establish a limitations period for claims challenging the rates, terms or

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[142] *2018 Order*, 33 FCC Rcd at 7770, ¶ 127 n.478.

[143] *See* 47 C.F.R. § 1.1424 (2011) ("In complaint proceedings where an [ILEC] claims that it is similarly situated to an attacher that is a telecommunications carrier…or a cable television system…the [ILEC] shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements."), *redesignated* as 47 C.F.R. § 1.1413 (2019).

[144] AT&T offers absolutely no economic analysis to support its complaint, either with respect to the period preceding the effective date of the Commission's new ILEC complaint rule or thereafter. *See Verizon Florida LLC v. Florida Power & Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1140-41 at ¶ 2 (Feb. 11, 2015) (dismissing ILEC complaint under old rule where ILEC made "no attempt to estimate the value of those unique benefits").

conditions of pole attachments. AT&T correctly notes that under federal law "when there is no statute of limitations expressly applicable to a federal statute, the general rule is that a state limitations period for an **analogous cause of action** is borrowed and applied to the federal claim."[145] AT&T, though, has failed to identify "an analogous state cause of action" and, instead, merely notes that "this action involves a North Carolina contract" as grounds to apply North Carolina's three-year statute of limitations for contract actions. Given that AT&T's complaint most certainly is **not** an action "upon a contract, obligation or liability arising out of a contract,"[146] AT&T's claim does not sound in contract law, and it would not make sense to apply North Carolina's statute of limitations for actions on a contract.[147]

Assuming *arguendo* that AT&T's cause of action can be construed as sounding in contract law, which DEP denies, it would be most analogous to an action to **rescind** a contract, given that AT&T's claims seek to disavow or rewrite—rather than enforce—the contract at issue. The same three-year limitations period applies to such an action and begins to run at the time the cause of

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[145] AT&T's Pole Attachment Complaint at ¶ 32 (emphasis added) (quoting *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018)).

[146] N.C. Gen. Stat. § 1-52(1); *see also* S.C. Code Ann. § 15-3-530(1) (applicable to "an action upon a contract, obligation, or liability…").

[147] AT&T cites the *Verizon Virginia v. Dominion Virginia Power* decision as supporting the application of a breach of contract statute of limitations, but this is not what *Verizon Virginia* says. *See* AT&T's Pole Attachment Complaint at ¶ 32 n.93. Importantly, the Commission made no finding regarding the "applicable statute of limitations" in *Verizon Virginia v. Dominion Power*. The Commission merely noted that Verizon contended that the applicable statute of limitations was a 5-year breach of contract limitations period and that the defendant in that case did not dispute that contention. *See Verizon Virginia, LLC and Verizon South, Inc., v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3764 at ¶ 28 n.104 (May 1, 2017). Furthermore, in the *AT&T v. FPL Decision* (and despite significant briefing in which AT&T took the same position it takes here), the Commission specifically "ma[de] no findings as to the appropriate statute of limitations." *AT&T v. FPL Decision*, 35 FCC Rcd at 5323, ¶ 6 n.19.

action accrues.[148] Here, AT&T bases its claim to "rescind" the contract on the premise that the cost-sharing methodology in the joint use agreement is not "just and reasonable" under Section 224. This right accrued no later than July 12, 2011 (the effective date of the Commission's 2011 order asserting jurisdiction over the rates, terms and conditions for ILEC attachments on electric utility poles).[149] This means that, **if North Carolina's state law statute of limitations applies, then AT&T's entire claim in this case—both backward looking and forward looking—is time barred**.

Notwithstanding the foregoing, application of a state limitations period for an action on a contract would not be consistent with Commission policy or recent Commission precedent. First, the Commission has a "longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts."[150] Therefore, it would be inconsistent for the Commission to borrow a state limitations period that applies to actions over which the Commission has consistently refused to exercise jurisdiction. Second, the Commission refused to apply the

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[148] *See* N.C. Gen. Stat. § 1-52(1); *Swartzberg v. Reserve Life Ins. Co.*, 113 S.E.2d 270, 276 (N.C. 1960) (acknowledging that the general rule is "a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises..."; *Monson v. Paramount Homes, Inc.*, 515 S.E.2d 445, 449 (N.C. 1999) ("Statutes of limitations are generally seen as running from the time of the injury, or discovery of the injury in cases where that is difficult to detect.") (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 328 S.E.2d 274, 276-77 n.3 (N.C. 1985)); *Hinson v. United Fin. Servs.*, 473 S.E.2d 382, 386 (N.C. App. 1996) ("In this state, speaking generally, a statute of limitations begins to run as soon as the right to sue arises."); *see also* S.C. Code Ann. § 15-3-530(1) (establishing three-year statute of limitations for "an action upon a contract, obligation, or liability..."); *Brown v. Finger*, 124 S.E.2d 781, 785 (S.C. 1962) ("While it is well settled that a statute of limitations commences to run only from the time that a cause of action accrues, it is often difficult to determine when that time arrives. The fundamental test, however, in determining whether a cause of action has accrued, is whether the party asserting the claim can maintain an action to enforce it. A cause of action accrues the moment when the plaintiff has a legal right to sue on it.") (internal citation omitted).

[149] *See* Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 76 Fed. Reg. 40,817, 40,817 (Jul. 12, 2011).

[150] *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987).

federal "catchall" statute of limitations (28 U.S.C. § 1658(a)) in a recent agency proceeding because the Commission determined that Section 1658(a) "governs court actions, not agency proceedings."[151] In making this determination, the Commission focused on the black letter of Section 1658(a) and interpreted its use of the term "action" to mean that it only applies to "judicial proceedings":

> Section 1658(a) provides: "Except as otherwise provided by law, **a civil action arising** under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." **The text, context, purpose, and history of Section 1658(a) makes clear that it governs court actions, not agency proceedings to recover improperly disbursed government funds**.
>
> **Albeit not universally, the term "action" in legal parlance most commonly means a judicial proceeding. It is particularly reasonable to apply that gloss here because Section 1658(a) includes not only the term "civil action" but also references the underlying "cause of action."** Black's Law Dictionary defines "cause of action" as "[a] group of operative facts giving rise to one or more bases *for suing*; a factual situation that entitles one person to obtain a remedy *in court* from another person." Thus, as the Fourth Circuit recently recognized, the text of Section 1658(a) **suggests that Congress was concerned with adversarial judicial proceedings**.[152]

Based on the Commission's reasoning in *Sandwich Isles*, none of North Carolina's statutorily prescribed limitations periods are applicable to agency proceedings, including those applicable to contract actions, because each statute of limitations states that it applies to "civil actions" (*i.e.*, "court actions" or "judicial proceedings" under *Sandwich Isles*).[153] Therefore, *Sandwich Isles*

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[151] *See In the Matter of Sandwich Isles Communications, Inc.*, Order on Reconsideration, WC Docket No. 10-90, 2019 FCC LEXIS 41, at *160-70, ¶¶ 131-37 (Jan. 3, 2019) (emphasis added).

[152] *Id.* at *161-62, ¶¶ 131-32 (italics in original) (bold-underline emphasis added).

[153] *See, e.g.*, N.C. Gen. Stat. § 1-52(1) (noting that an "**action**...[u]pon a contract" must be commenced "within three years") (emphasis added); N.C. Gen. Stat. § 1-46 ("The periods prescribed for the commencement of **actions**...are as set forth in this Article [*i.e.*, the same article containing the limitations period for actions upon a contract].") (emphasis added); NC. Stat. Gen. § 1-15(a) ("**Civil actions** can only be commenced within the periods prescribed in this Chapter [*i.e.*, the chapter containing the limitations period for actions upon a contract], after the **cause of**

seemingly precludes the Commission from borrowing North Carolina's limitations period for actions on a contract.

While the general rule requires the borrowing of a limitations period for an analogous state cause of action, federal law allows for the borrowing of a federal limitations period (1) "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes" and (2) "when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."[154] The two-year statute of limitations in 47 U.S.C. § 415(c) clearly fits within this exception to the general rule.[155] Section

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action has accrued...") (emphasis added). Moreover, North Carolina's limitations periods, including the limitations period applicable to actions upon a contract, are contained within "Chapter 1. **Civil Procedure**", which further demonstrates that the limitations periods apply to "judicial proceedings," as opposed to "agency proceedings." South Carolina's statutorily prescribed limitations periods also clearly apply to "judicial," as opposed to "agency," proceedings. *See, e.g.*, S.C. Code Ann. § 15-3-530(1) (stating that "an **action** upon a contract..." must be commenced "[w]ithin three years") (emphasis added); S.C. Code Ann. § 15-3-20 ("**Civil actions** may only be commenced within the periods prescribed in this title [*i.e.*, the title containing the limitations periods for actions upon a contract] after the **cause of action** has accrued...") (emphasis added). Moreover, South Carolina's limitations periods, including the limitations period applicable to actions upon a contract, are contained within "Chapter 3. Limitations of **Civil Actions**" of "Title 15. **Civil Remedies and Procedures**."

[154] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (internal quotation marks and citation omitted), *superseded by statute*, Judicial Improvements Act of 1990, 101 P.L. 650, § 313, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 1658); *see also Hoang*, 910 F.3d at 1101 (recognizing exception to the general rule that allows for the borrowing of a federal limitations period).

[155] 47 U.S.C. § 415(c) ("For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues..."); *see e.g.*, *Am. Cellular Corp. and Dobson Cellular Sys. Inc. v. BellSouth Telecomms., Inc.*, Memorandum Opinion and Order, Release No. DA 07-228, 22 FCC Rcd 1083, 1083-84 at ¶ 1 (Jan. 31, 2007) (dismissing complaint filed under Section 208 for alleged over-billing as time barred under Section 415's two-year statute of limitations); *Michael J. Valenti and Real Estate Mkt. Place of New Jersey t/a Real Estate Alt. v. Am. Tel. and Tel. Co. and MCI Telecommunications Corp.*, Memorandum Opinion and Order, Release No. FCC 97-26, 12 FCC Rcd 2611, 2623 at ¶ 28 (Feb. 26, 1997) (denying applications for review and finding the Common Carrier Bureau properly dismissed complaints filed pursuant to Section 208 as time-barred by Section 415's two-year statute of limitations); *Municipality of Anchorage d/b/a Anchorage Tel. Util. v. ALASCOM, Inc.*, Memorandum Opinion and Order, Release No. DA 89-282, 4 FCC Rcd

415(c) applies to claims against regulated carriers for overcharges.[156] Because AT&T is arguing that DEP is overcharging it for pole attachment rental, the cause of action to which Section 415 applies "clearly provides a closer analogy" to AT&T's claims than a state contract action. Moreover, Section 415 is expressly applicable to Section 208 complaints, and Section 208 complaints and Section 224 complaints are now governed by the same procedural rules, which further demonstrates that actions under Section 415(c) provide a closer analogy to AT&T's claims than any state cause of action. Section 415(c) is also a "significantly more appropriate vehicle for interstitial lawmaking" than variable state-level limitations periods. Applying variable state-level limitations periods would lead to highly variable results, depending on the state at issue. For example, AT&T is arguing for the application of North Carolina's three-year limitations period for contract actions in these proceedings. In AT&T's parallel proceedings against DEP's affiliate Duke Energy Florida, LLC, AT&T is arguing for the application of Florida's five-year limitations period for contract actions.[157] Despite the fact that AT&T's claims in each proceeding are virtually identical and premised on the same FCC regulation, the application of different state statutes of limitations would create a variance in the scope of relief AT&T could pursue in each proceeding. Further, DEP expects that AT&T would contend in any action against AT&T by a CATV or CLEC arising under Section 224 that the "applicable statute of limitations" would be the two-year

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2472, 2477 at ¶ 34 (Mar. 20, 1989) (dismissing claims filed pursuant to Section 208 as time-barred under Section 415's two-year statute of limitations).

[156] *See* 47 U.S.C. § 415(c); *see also* 47 U.S.C. § 415(g) (defining "overcharges" as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commissioner").

[157] *See Bellsouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, EB-20-MD-003, AT&T's Pole Attachment Complaint at ¶ 32 (Aug. 25, 2020); *see also id.* at ¶ 32 n.94 (citing Fla. Stat. § 95.11(2)(b) (establishes a five-year statute of limitations for a "legal or equitable action on a contract")).

limitations period in Section 415(c). If this is the case, then AT&T is essentially saying that it is protected by a two-year limitations period for Section 224 complaints, but that electric utilities are subject to variable (and longer) limitations periods, depending on the state. This cannot be the result under the law. DEP denies any remaining allegations in paragraph 32.

33. DEP denies that AT&T has overpaid DEP at any point in time and denies that the net rentals it collected from AT&T since 2017 were "collected in violation of federal law." If AT&T actually thought these amounts were "in violation of federal law" then (a) AT&T would not have certified in writing each year that the net rentals were correct, and (b) AT&T would have mentioned this before May 22, 2019. DEP further denies that a refund would be "consistent with the Commission's intention." In fact, as set forth above in paragraph 32, a refund would be specifically contrary to the Commission's intention "to encourage broadband deployment **going forward**."[158] It is also bizarre that AT&T would allege, as it does in the fourth sentence of paragraph 33, that a failure to award a refund "discourages pre-complaint negotiations between the parties." Here, it is not as if AT&T raised a dispute about the cost-sharing provisions in the existing joint use agreement in 2017 and then waited until 2020 to file its complaint. **AT&T never even mentioned (let alone raised) a dispute until May 22, 2019**. To the contrary, in each year prior to 2019, AT&T actually certified the correctness of the annual billing. So, there were not any "pre-complaint negotiations" to be had between the parties prior to the time AT&T first raised this dispute on May 22, 2019. In any event, if there is anything unjust or unreasonable about the existing cost-sharing arrangement between DEP and AT&T, it is that DEP is currently paying AT&T a per pole rate that **vastly exceeds** AT&T's entire annual pole cost.[159] In fact, on AT&T-

[158] *2018 Order*, 33 FCC Rcd at 7770, ¶ 127 n.478 (emphasis added).

[159] *See supra* ¶ 22.

owned joint use poles in South Carolina during billing year 2019, DEP paid an annual rate nearly **triple** AT&T's entire annual pole cost.[160] And even if AT&T were paying for its pole space on a per foot basis like DEP's CATV and CLEC licensees, those amounts would be **significantly higher** than the annual rates as calculated under the joint use agreement.[161] AT&T doesn't just have a deal that is good for them; they may have a deal that is unjust and unreasonable for DEP. DEP denies any remaining allegations in paragraph 33.

IV. COUNT I—THE COMMISSION SHOULD REFRAIN FROM DISTURBING THE COST-SHARING METHODOLOGY IN THE JOINT USE AGREEMENT.

34. DEP adopts and incorporates paragraphs 1 through 33 above, as if fully set forth herein.

35. DEP denies that the Commission is "statutorily required to ensure that the pole attachment rates that Duke Energy Progress charges AT&T are just and reasonable." In fact, until 2011, the Commission interpreted the Act as **prohibiting** the regulation of the rates, terms and conditions of AT&T's attachments on DEP's poles.[162] In other words, even if the Commission's current interpretation of the statute is permissible, the Commission most certainly is not "statutorily required" to regulate this relationship. Further, to the extent there is a statutory "requirement" to regulate the joint use network cost-sharing relationship between DEP and AT&T, the Commission should forbear from exercising such authority under 47 U.S.C. § 160(a).[163] Even

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[160] *See id.*

[161] *See supra* ¶¶ 12, 22.

[162] In an early rulemaking implementing the 1996 Act, the Commission noted that an "ILEC has no rights under Section 224 with respect to the poles of other utilities." *1998 Report and Order*, 13 FCC Rcd at 6781, ¶ 5; *see also 2011 Order*, 26 FCC Rcd at 5328, ¶ 205.

[163] *See* 47 U.S.C. § 160(a) (The Commission "shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . . if the Commission determines that - - (1) enforcement of such regulation or provision is not necessary to ensure that

if the Commission is reluctant to forbear in this case, it should still suspend or waive the applicability of Rule 1.1413 (and its predecessor rule) given the facts of this particular case, pursuant to Rule 1.3.[164]

36. DEP denies that the cost-sharing provisions of the joint use agreement are unjust, unreasonable, or otherwise in violation of the Pole Attachments Act. To the contrary, the cost-sharing provisions are just, reasonable and consistent with what AT&T's internal strategy documents indicate is the "most equitable" and "almost as good" methods of sharing costs in a joint use network.[165] Moreover, as set forth above, even if AT&T were afforded a "per foot" rate consistent with DEP's CATV and CLEC licensees, it would yield a rate significantly in excess of the rates yielded by the joint use agreement.

37. The just and reasonable rate for AT&T's attachments to DEP's poles is the rate calculated in accordance with the joint use agreement. But in the event the Commission applies the new telecom rate to AT&T's attachments to DEP's poles, it should be applied on a per foot basis to avoid discriminating against DEP's CATV pole licensees as explained above in paragraph 12. Based on the data set forth above regarding AT&T's actual occupancy levels and the new

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the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.").

[164] 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

[165] *See* Ex. 6 at DEP000196 (AT&T's Internal Division of Cost Circular at p. 17); *see also supra* ¶ 26.

telecom rates charged to DEP's CLEC licensees for one foot of pole space, the following per pole rates would apply to AT&T for years 2017 through 2019:

	2017	2018	2019
CLEC Rate	$ [redacted]	$ [redacted]	$ [redacted]
Contract Rate paid by AT&T (per pole)	$ [redacted]	$ [redacted]	$ [redacted]

Under this approach, AT&T's rates for the use of DEP poles would have been significantly higher than under the joint use agreement during the same period. DEP denies that AT&T is entitled to any sort of refund, denies that DEP charged AT&T unjust or unreasonable rates at any time during the 2017-2019 time period, and denies any remaining allegations in paragraph 37.

38. As explained above, the pre-existing telecom rate formula cannot serve as a "cap" on the rate for existing joint use poles owned by DEP because this "cap" (if it applies at all) applies only to agreements "entered into or renewed" after March 11, 2019. Because DEP lacks the ability to terminate the agreement with respect to existing attachments, the agreement cannot "renew" with respect to those attachments. AT&T, in essence, has a unilateral perpetual license option on 148,000 joint use poles owned by DEP. But even if the pre-existing telecom rate formula is a "cap," it would yield the following rates based on the same assumptions used in paragraph 37 above (along with the actual average of [redacted] entities per pole):

	2017	2018	2019
Pre-Existing Telecom Rate[166]	$ [redacted]	$ [redacted]	$ [redacted]
Contract Rate Paid by AT&T	$ [redacted]	$ [redacted]	$ [redacted]

Even though the pre-existing telecom rate formula yields a slightly lower rate for AT&T's use of DEP's poles than the joint use agreement's cost sharing methodology, this is offset, at least in part, by the more dramatic reductions to the rate DEP would pay for use of AT&T's poles under this

[166] Ex. D at DEP000308-09 (Harrington Declaration ¶ 16).

methodology. The following chart compares the contract rate paid by DEP to the pre-existing telecom rate AT&T calculates for DEP's use of AT&T's poles:

	2017	2018	2019
Pre-Existing Telecom Rate (SC)[167]	$ [redacted]	$ [redacted]	$ [redacted]
Pre-Existing Telecom Rate (NC)[168]	$ [redacted]	$ [redacted]	$ [redacted]
Contract Rate Paid by DEP	$ [redacted]	$ [redacted]	$ [redacted]

DEP denies that AT&T is entitled to any sort of refund and denies any remaining allegations in paragraph 38.

V. AT&T'S COMPLAINT SHOULD BE DENIED.

39. The Commission should deny AT&T's request "that the Commission find that Duke Energy Progress charged and continues to charge AT&T unjust and unreasonable rates in violation of federal law." As set forth above, the cost-sharing provisions in the existing joint use agreement not only are just and reasonable, but also are consistent with AT&T's own internal strategy documents identifying the "most equitable" means of allocating the costs of a joint use network.

40-42. The Commission should deny AT&T's request that the Commission establish different rates for the 2017-present time period, especially given that AT&T never even voiced an objection to the cost-sharing methodology in the joint use agreement until May 22, 2019. But in

[167] The figures in this row presume the accuracy of AT&T's calculation of the "proportional" pre-existing telecom rate that DEP would have paid on AT&T poles in South Carolina (which is based on 10.5 feet of space and includes the communication worker safety zone in DEP's space allocation given that DEP is the licensee of AT&T's poles). *See* AT&T's Pole Attachment Complaint, Ex. C at ATT00019 (Affidavit of Daniel P. Rhinehart, Aug. 31, 2020, Ex. R-3).

[168] The figures in this row presume the accuracy of AT&T's calculation of the "proportional" pre-existing telecom rate that DEP would have paid on AT&T poles in North Carolina (which is based on 10.5 feet of space and includes the communication worker safety zone in DEP's space allocation given that DEP is the licensee of AT&T's poles). *See* AT&T's Pole Attachment Complaint, Ex. C at ATT00018 (Affidavit of Daniel P. Rhinehart, Aug. 31, 2020, Ex. R-3).

the event the Commission unwinds the cost-sharing provisions of the joint use agreement, any alternative rates that it sets should be consistent with the rates set forth in paragraphs 37 or 38 above.

In addition to denying the relief sought by AT&T, the Commission should also award to DEP such relief as the Commission deems necessary, just and reasonable.

AFFIRMATIVE DEFENSES

DEP, in accordance with Rule 1.726(e), adopts and incorporates the facts set forth above and separately pleads the following affirmative defenses:

1. AT&T is estopped from seeking a refund for periods that precede May 22, 2019, which is the date AT&T first provided notice to DEP that it disputed the cost-sharing provisions of the joint use agreement.

2. AT&T waived its right to seek a refund for periods that precede May 22, 2019 because AT&T failed to provide any notice to DEP prior to that date that it disputed the cost-sharing provisions of the joint use agreement.

3. AT&T's claims are barred by the three-year statute of limitations applicable to actions to rescind a contract under North Carolina law.

4. AT&T's claims are barred by the two-year statute of limitations applicable to actions to recover overcharges under 47 U.S.C. § 415(c).

5. AT&T's claims for all years prior to 2019 are barred by accord and satisfaction, based on the pre-billing exchange of information, AT&T's attestation to the accuracy of the rates to be billed, and AT&T's payment of those bills.

6. AT&T's claims for all years prior to 2019 are barred because AT&T acquiesced, consented to, and ratified the rates billed for those years based on the pre-billing exchange of information, AT&T's attestation to the accuracy of the rates to be billed, and AT&T's payment of those bills.

7. AT&T's claims for all years prior to 2019 are barred because AT&T waived any right to contest the rates billed for those years based on the pre-billing exchange of information, AT&T's attestation to the accuracy of the rates to be billed, and AT&T's payment of those bills.

8. AT&T has received and continues to enjoy numerous valuable benefits and competitive advantages under the joint use agreement due to DEP's complete performance thereunder. Therefore, it would be inequitable for the Commission to grant any of the relief sought in AT&T's complaint because it would unjustly enrich AT&T at the expense of DEP and its electric ratepayers.

9. In the event the Commission grants any of the relief sought in AT&T's complaint, it will render the joint use agreement unconscionable and therefore unenforceable.

10. AT&T's claim for relief under the Commission's new ILEC complaint rule fails to state a claim upon which relief can be granted because the joint use agreement at issue was not "entered into or renewed" after the effective date of the rule.

11. The Commission should forbear from exercising jurisdiction in this case because the

facts and circumstances that gave rise to the Commission's assertion of jurisdiction over the rates, terms and conditions of ILEC attachments to electric utility poles are not present in this case.

12. Pursuant to Rule 1.3, the Commission should waive the applicability of Rule 1.1413 and its predecessor rule to this case.

13. The rule upon which AT&T's complaint is premised is unlawful, *ultra vires*, arbitrary, capricious, and unreasonable.

14. The doctrine of laches bars some or all of AT&T's claims.

15. The applicable statute of limitations bars some or all of AT&T's claims.

16. DEP reserves the right to assert other affirmative defenses as pleadings and discovery in this case progress.

Dated: November 13, 2020

Respectfully submitted,

/s/ Eric B. Langley
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Duke Energy Progress, LLC

INFORMATION DESIGNATION

1. The DEP employees and outside experts with relevant information about this proceeding and dispute are identified in this answer and its supporting declarations, and exhibits.

2. The joint use agreement, exemplar pole license agreements, and correspondence between the parties are attached as exhibits to this answer. Also attached are declarations of DEP employees and third-party experts. Unless privileged or otherwise protected from disclosure, any additional relevant documents, electronically stored information, and/or tangible things, to the extent they exist, may be made available for inspection and copying at DEP's corporate offices. Additional information and documents were filed and served on October 14, 2020 with DEP's Responses to AT&T's First Set of Interrogatories. Additionally, DEP is seeking information from AT&T via interrogatories that are being served concurrently with this answer. DEP reserves the right to rely on information that is not included or attached to this answer if it is provided by AT&T or becomes relevant.

RULE 1.721(m) VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read the Answer to Pole Attachment Complaint and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded and in fact is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

/s/ Eric B. Langley
Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this day, November 13, 2020, a true and correct copy of Duke Energy Progress, LLC's Answer to AT&T's Complaint was filed with the Commission via ECFS and was served on the following (service method indicated):

Robert Vitanza Gary Phillips David Lawson AT&T SERVICES, INC. 1120 20th Street NW, Suite 1000 Washington, DC 20036 (by Federal Express)	Marlene H. Dortch, Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554 (by Federal Express and ECFS)
Christopher S. Huther Claire J. Evans Frank Scaduto WILEY REIN LLP 1776 K Street NW Washington, DC 20006 chuther@wileyrein.com cevans@wileyrein.com fscaduto@wileyrein.com (by Federal Express and E-Mail)	Mike Engel Federal Communications Commission Market Disputes Resolution Division Enforcement Bureau Michael.Engel@fcc.gov (by E-Mail)
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/s/ Eric B. Langley
Of Counsel

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina,	)	
Complainant,	)	**Proceeding No.: 20-293**
v.	)	**Bureau ID No.: EB-20-MD-004**
DUKE ENERGY PROGRESS, LLC,	)	
Defendant.	)	

DECLARATIONS

Exhibit A. Declaration of Gilbert Scott Freeburn (Nov. 13, 2020).

Exhibit B. Declaration of David J. Hatcher (Nov. 13, 2020).

Exhibit C. Declaration of Steven D. Burlison (Nov. 13, 2020).

Exhibit D. Declaration of Dana M. Harrington (Nov. 12, 2020).

Exhibit E. Declaration of Kenneth P. Metcalfe, CPA, CVA (Nov. 12, 2020).

EXHIBITS

Exhibit 1. Amended and Restated Agreement Covering Joint Use of Poles Between Carolina Power & Light ("DEP") and Bellsouth Telecommunications, Inc. ("AT&T"), dated October 20, 2000 ("Joint Use Agreement").

Exhibit 2. Agreement Covering Joint Use of Poles Between Carolina Power & Light Company ("DEP") and Southern Bell Telephone and Telegraph Company ("AT&T"), dated September 29, 1977 ("1977 Joint Use Agreement").

Exhibit 3. Letter from Dianne Miller, AT&T, to Scott Freeburn, DEP (Sep. 5, 2019).

Exhibit 4. Letter from Scott Freeburn, DEP, to Dianne Miller, AT&T (Sep. 10, 2020).

Exhibit 5. Exhibit B Cost Schedule (effective Jan. 1, 2020).

Exhibit 6. AT&T's Internal Division of Cost Circular (Sep. 1972).

Exhibit 7. Exemplar CLEC Pole Attachment License Agreement.